Office-Supreme Court, U.S.
FILED
FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1429

In the Supreme Court of the United States

October Term, 1980
No.

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,
Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that institutionalized mentally retarded persons have substantive due process rights (1) to receive treatment which is both acceptable in light of present medical or other scientific knowledge and which is the least intrusive treatment available under the circumstances; (2) to be free of restraints, whether for treatment or protection, absent a showing of compelling necessity and (3) to be protected from harm, however caused, absent a showing of substantial necessity.

2. Whether an appellate court which admittedly creates new constitutional rights in considering claims for damages under 42 U.S.C. §1983 must, as a matter of law, direct dismissal of that claim on the grounds of qualified immunity.

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The opinion of the Third Circuit has not yet been reported, and is reproduced in the appendix (1a). The opinion of the District Court on the defendants' motion to dismiss was not reported, *Romeo v. Youngberg*, No. 76-3429 (E.D. Pa., filed June 6, 1977), and is also reproduced in the appendix (79a-85a).

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision on November 24, 1980. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

United States Statute

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Pennsylvania Statute

Pa. Stat. Ann. tit. 50 §4406

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such per-

son cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

. . .

STATEMENT OF THE CASE

Plaintiff is a profoundly mentally retarded person who was involuntarily committed[1] to Pennhurst State School and Hospital[2] in July of 1974, at age 26, at the request of his mother, who was no longer able to care for him at home. While at Pennhurst, plaintiff has been injured on a number of occasions. These injuries were both self-inflicted and the result of attacks by other residents, mostly in retaliation against his aggressive behavior.

This civil rights action was brought in November of 1976 by plaintiff's mother on his behalf. By his original complaint, plaintiff sought damages under 42 U.S.C. §1983 from three supervisory officials at Pennhurst for the injuries he had incurred,[3] relying on the Eighth and Fourteenth Amendments. He also sought an injunction requiring that he be protected from such harm in the future.

Subsequently, plaintiff amended his complaint to include allegations that defendants had kept him shackled or otherwise physically restrained to a bed or chair in the

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[1] Plaintiff was committed pursuant to the involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 §4406 (Purdon). The legality of that commitment is not at issue in this case.

[2] Pennhurst is a state operated institution for the mentally retarded. It is the focus of *Pennhurst State School and Hospital v. Halderman*, No. 80-1404, presently pending before this Court.

[3] Plaintiff alleged that defendants knew of his injuries and, as supervisors, failed to create procedures which would have avoided such injuries from occurring in the future.

hospital at Pennhurst for long periods of time each day.[4] The amended complaint also sought damages for defendants' alleged failure to provide plaintiff appropriate treatment in the least restrictive environment. Plaintiff also requested injunctions against the alleged constitutional violations, but withdrew those requests prior to trial.[5]

Trial was held in April of 1978. At trial, the District Court refused to permit plaintiff to present the testimony of two experts who, according to plaintiff, would have testified that the plaintiff's treatment programs at Pennhurst were inappropriate and that plaintiff's injuries were the result of the failure to provide more appropriate programming[6] (97a-101a, 102a-104a) Plaintiff also represented that one of those experts would testify that, while restraints are a proper mode of treatment in some cases, they were used improperly in plaintiff's case (101a). The District Court excluded the testimony, ruling that, while it might be relevant to an issue of malpractice, it had no relevance to the constitutional claims[7] (101a, 105a, 109a).

In addition, the District Court rejected a jury instruction proposed by plaintiff which maintained that

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[4] At trial, defendants contended that plaintiff was placed in the hospital at the request of his attorney and that in that setting restraints were necessary to protect other patients.

[5] Plaintiff is a member of the class in *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S.Ct. 2984 (1980), and, therefore, was required to seek injunctive relief in the context of that case.

[6] There is no dispute that plaintiff has received treatment while at Pennhurst. Plaintiff does dispute the appropriateness of that treatment.

[7] The evidence showed that plaintiff had received a variety of treatment programs intended to curb his aggressive behavior and reinforce his self-help skills (N.T. 5-44, 5-45, 5-48, 5-55).

plaintiff had a right to treatment in the least restrictive environment. Instead, determining that plaintiff's claims were governed solely by the Eighth Amendment,[8] the court instructed the jury that in order to find for plaintiff, it must find that defendants acted with "deliberate indifference to the serious medical needs of the resident."[9]

At the conclusion of eight days of trial, the jury returned a verdict in favor of all defendants. Plaintiff appealed that verdict to the Court of Appeals.

On appeal, the Court of Appeals[10] found that the District Court had erred in excluding the expert testimony offered by plaintiff and that the court had also erred in issuing an Eighth Amendment instruction to the jury.[11] Accordingly, the Court of Appeals vacated the judgment

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[8] Neither plaintiff's complaint nor his proposed points for charge describe the specific source of the constitutional rights asserted by him. Rather, repeated reference is made to rights under the Eighth and Fourteenth Amendments. The District Court apparently construed plaintiff's claims as arising solely under the Eighth Amendment as made applicable to the states under the Fourteenth Amendment. The Court of Appeals disagreed. While recognizing plaintiff's failure to assert clearly the Fourteenth Amendment as a separate legal basis for relief, the Court of Appeals construed the complaint as asserting substantive due process claims (6a, n. 2).

[9] In so doing, the court relied on *Estelle v. Gamble*, 429 U.S. 97 (1976).

[10] The case was first heard in January of 1979 by the same panel that heard *Halderman v. Pennhurst State School and Hospital, supra.* As in *Halderman*, that panel issued no opinion; instead, after issuance of the *Halderman* opinion by the Court en banc, this case was scheduled for reargument before the Court en banc. Reargument was heard April 28, 1980.

[11] Plaintiff raised several other grounds for reversal. The Court of Appeals did not base its decision on those grounds.

of the District Court and remanded the case for a new trial.

However, the Third Circuit was sharply divided, five-four,[12] on the issue of the standards to be applied in evaluating plaintiff's claims. The majority discerned three separate constitutional rights, all based in substantive due process: (1) a right to be free from undue bodily restraint; (2) a right to personal security and protection; and (3) a right to the "least intrusive" adequate treatment.[13]

Specifically, the majority held that the use of physical restraints may be justified only by defendants' showing of "compelling necessity", i.e., that the restraints are essential to protect or treat the resident (18a-20a).[14] In addition, in order to be justified, the restraints used must have been "the least restrictive method of dealing with the patient in light of his problems and the surrounding environment" (18a-19a). Finally, the majority held that, except in emergency situations, neither inadequate resources nor administrative concerns justify the use of restraints (18a).

The majority went on to hold that a failure to protect a resident from attacks by other residents could be justified only by "substantial necessity" (25a). According to the majority, the "substantial necessity" standard

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[12] There were three concurring opinions (48a-78a).

[13] The lower court purported to limit its holding to the involuntarily confined (3a, 47a). This distinction is apparently irrelevant in light of that court's holding in *Halderman* that all residents of Pennhurst were there involuntarily, 612 F.2d at 94.

[14] Thus, according to the majority, the use of restraints to protect others is not permissible under any circumstances.

would require the jury to distinguish between isolated mishaps and patterns of attacks, injuries or violent behavior (25a).

Finally, in evaluating plaintiff's right to treatment claim, the majority established three separate standards. While conceding that the evidence in this case did not suggest a failure to treat plaintiff, the majority nonetheless addressed that situation,[15] holding that a failure to provide treatment can be justified only by a compelling explanation (35a, 47a). On the other hand, if some treatment is provided, the constitution generally requires that that treatment be both "acceptable in light of present medical or other scientific knowledge" (36a-38a) and the "least intrusive treatment available under the circumstances" (31a-32a).[16]

The four concurring judges, per Chief Judge Seitz, disagreed with the majority's multi-pronged approach. Instead, recognizing that each of plaintiff's claims involved mixed questions of law and medical judgment, Chief Judge Seitz found that plaintiff's claim should be evaluated un-

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[15] As each of the concurring judges noted, the majority considered several issues not raised in this case (Seitz, C.J., 48a; Aldisert, J., 74a; Garth, J., 76a-77a). Moreover, these issues are also incorporated in proposed jury instructions set forth in an appendix to the majority opinion (47a).

[16] While, in its proposed jury instructions, the court purported to limit application of the "least intrusive treatment" requirement to those situations imposing "significant deprivations of liberty" (47a), this distinction is meaningless. Obviously, where no "significant deprivation of liberty" is occurring, a nonrestrictive treatment is being used, satisfying the "least intrusive" standard. Thus, implicitly or explicitly, the "least intrusive" standard must be met in every treatment decision.

der a single standard: whether defendants' conduct "was such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment" (59a).

It is from this decision that the defendants, hereinafter referred to as petitioners, seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Questions of Great Public Importance

"This case presents legal issues that take the next step beyond *Halderman* [*v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir. 1979) (en banc), *cert. granted*, 100 S.Ct. 2984 (1980),]"[17] a case heard by this Court earlier this term. In *Halderman*, the Third Circuit found a right to treatment in the least restrictive environment under a federal statute[18] and, therefore, found it unnecessary to reach the constitutional right to treatment issues.[19] In this case, however, the Third Circuit was required to reach those constitutional issues[20] and to do so in the context of the specific treatment provided an individual resident of Pennhurst.

This case also involves an issue akin to that presented in *Parratt v. Taylor*, No. 79-1734 (U.S. S.Ct.), *cert. granted*, 101 S.Ct. 315 (1980), a case this Court will consider later this term. In *Parratt*, the Eighth Circuit summarily affirmed a district court ruling that simple negli-

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[17] (49a) (Seitz, C.J., concurring).

[18] Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6001-6081.

[19] If, as requested by petitioners therein, this Court reverses the lower court's statutory finding in *Halderman*, either this Court or the Court of Appeals would then be required to reach essentially the same constitutional issues raised in this case.

[20] Plaintiffs asserted only constitutional claims.

gence can form the foundation for an action under 42 U.S.C. §1983. 620 F.2d 307 (8th Cir. 1980). In this case, the Third Circuit has adopted that proposition and extended it to malpractice.

In so doing, the Third Circuit broke new ground, going far beyond the holdings of this Court.[21] Notwithstanding this Court's repeated admonition against the creation of constitutional torts,[22] the Third Circuit has done exactly that—in triplicate. First, the court found that institutionalized mentally retarded persons have a substantive due process right to treatment which is "acceptable in light of present medical or other scientific knowledge" (37a-38a) and which must also be the "least intrusive available under the circumstances" (31a-32a). But see *O'Connor v. Donaldson*, 422 U.S. 563 (1974) (establishing a right to liberty where no treatment provided to a non-dangerous patient who is able to survive safely in freedom). The court also held that such persons have separate and distinct due process rights to be free of restraints except in cases of "compelling necessity" and to be protected from harm unless "substantial reasons" exist for the failure to do so (18a-20a, 25a). But see *Bell v. Wolfish*, 441 U.S. 520 (1979) (rejecting the use of "compelling necessity" standard in evaluating conditions of pretrial detention). Thus, in an area in which this Court has

[21] Indeed, in *State v. Sanchez*, 396 U.S. 276 (1970), this court dismissed for want of a substantial federal question an appeal asserting a constitutional right to treatment in the least restrictive environment. The Third Circuit considered *Sanchez*, but rejected it as binding precedent (37a, n. 56).

[22] See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Screws v. United States*, 325 U.S. 91 (1945).

cautioned against judicial interference and has itself acted with extreme restraint,[23] the Third Circuit has created constitutional rights far beyond those considered, let alone recognized, by any other court.[24]

One obvious result of this holding will, of course, be increased federal litigation. In 1976, there were over 150,000 mentally retarded persons in the United States residing in state institutions.[25] Under the Third Circuit's holding, the federal courts will become repositories for most, if not all, personal injury claims arising in those institutions as its standards for proving constitutional violations are generally less stringent than those applicable to state law claims arising out of identical activities,[26] such

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[23] See, e.g., *Parham v. J. R.*, 442 U.S. 584 (1979); *O'Connor v. Donaldson, supra.*

[24] Many courts have considered the constitutional rights of the mentally retarded. See, e.g., *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *J. L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), *rev'd. on other grounds*, 442 U.S. 584 (1979). Cf. *O'Connor v. Donaldson, supra* (mentally ill). No other court has even suggested the standards of "compelling" or "substantial necessity" in relation to the treatment of the mentally retarded. In addition, even the Fifth Circuit, initially the leading proponent of a constitutional right to treatment, has since expressed its strong reservations concerning the very existence of such a right. Compare *Morales v. Turman*, 562 F.2d 993 (5th Cir.), *rev'd and rem'd on other grounds*, 430 U.S. 322 (1977) (per curiam) with *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *rev'd*, 422 U.S. 563 (1975).

[25] *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295, 1300, n. 7 (E.D. Pa. 1978).

[26] An additional incentive to bring these actions in federal court is the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988.

as malpractice.[27] In addition, the Third Circuit, relying exclusively on its decision in this case, has recently created equivalent rights for the mentally ill. *Scott v. Plante*, Nos. 80-1314/1315, 80-1596 (3d Cir., filed Feb. 5, 1981) (116a). Thus, judicial review, on constitutional grounds, of individual treatment regimes and modalities will become commonplace, both as to damages and injunctive relief.

As importantly, while the Third Circuit clearly imposed new and extensive obligations on state employees, the nature of those obligations is far from clear. Indeed, as is discussed below, those duties appear to conflict with each other in several respects. Ironically, because of this vagueness, the decision will likely have serious adverse effects on the care of the retarded. The reasons were aptly described by Judge Aldisert, concurring in the decision below:

> It has been almost twenty years since I faced a client across a law office desk. But were I to be placed in that position today, my advice would probably go like this: if you are contemplating a position as an attendant in a mental hospital, seek another job; there is simply too much unpredictability in the law governing your conduct. If you are a physician, make certain that the state's malpractice insurance policy includes a clause protecting you from the new 'constitutional torts' manufactured today by the Third Circuit Court of Appeals. If you are an insurance

[27] See *Incollingo v. Ewing*, 444 Pa. 263, 282 A.2d 206 (1971) (unjustified departure from established standards of medical practice is malpractice). Pennsylvania law, of course, makes no reference to the concept of "less intrusive treatment".

> carrier, set your premiums high, anticipating fully and completely the open-ended notions of 'substantial' and 'compelling' necessity and 'least intrusive treatment.' If you are a governor or state legislator, cut back and retrench institutional programs for the mentally retarded, because the potential for lawsuits has now increased geometrically, with corresponding demands on the tax base to support the costs. If you are a parent with a retarded child, I simply feel sorry for you. The sincere effort to provide financial relief for personal injuries suffered by retarded persons has been accomplished at an enormous social cost. In striking the balance between how seriously the complainants are being hurt and how much it will cost to afford them more relief than is presently available under state tort law, the balance has been struck so vaguely that state institutional programs, already diminishing, will be curtailed further. Given the recent political currents, there simply are not, and will not be, sufficient tax dollars, state or federal, to give the defendants adequate financial protection to meet the illusory standards promulgated today.

(75a-76a) (Aldisert, J., concurring).

This Court should intervene at this point to avoid the confusion which will certainly result from the broad holding of the court below. Accordingly, and because this case involves issues of great public importance, this Court should grant review of this case.

II. The Decision of the Court of Appeals Is Clearly Erroneous

A. The Third Circuit erred in evaluating the rights of the mentally retarded.

Plaintiff asserted a "right to treatment under the least restrictive conditions consistent with the purpose of the commitment" (95a). The Court of Appeals took this claim and converted it into a complex multi-level series of constitutional rights relating to institutional conditions.[28]

The Third Circuit's holding firmly supports this Court's conclusion that courts are poorly equipped to make medical judgments. *Parham v. J.R.*, 442 U.S. 584, 606-09 (1979). The series of rights created by the majority are complex and confusing. Indeed, they impose conflicting obligations on those persons who must ensure their effectuation. As importantly, they improperly interfere with the exercise of professional judgment, providing "constitutional" answers to questions which are still hotly debated among experts (58a) (Seitz, C.J., concurring).

In this regard, it is important to note that as even plaintiff's expert was prepared to testify (101a), the use of restraints is an acceptable form of treatment. Likewise, the use of restraints may often provide protection

[28] The court also determined that expert testimony, excluded by the District Court as irrelevant, was relevant under the newly-created standards. The admissibility of the proffered testimony will depend on the standards ultimately developed, should review be granted in this case.

from harm, as well as protection for others. Yet, according to the Third Circuit, an otherwise appropriate use of restraints, whether for treatment or protection, is constitutionally prohibited absent "compelling necessity". In addition, other "acceptable" modes of treatment are prohibited unless determined to be the "least intrusive treatment available".

These standards require state officials, including administrators,[20] doctors and non-professional staff, to engage in a delicate balancing of constitutional rights in nearly every treatment decision. The difficult reality of caring for the mentally retarded does not lend itself to the neat and artificial divisions created by the court below. This is especially true when those "decision[s] must be made amid the cry and tumult of a mental hospital, not in the cloister of the Third Circuit law library, nor in the conference room of nine circuit judges who are divided five to four on a difficult problem" (73a) (Aldisert, J., concurring).

For example, according to the Third Circuit, a "few bruises" (a failure to protect a patient from harm) *might* be justified by a staff decision that "it is therapeutically more desirable to have an admittedly aggressive patient mingling with others instead of confined to an isolated cell" (26a, n. 38). The court did not explain how the

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[20] For example, in *Scott v. Plante, supra,* the Third Circuit found a basis for damage liability against the New Jersey Commissioner of the Department of Institutions and Agencies grounded solely on her knowledge of the conditions at a mental health institution and her failure to remedy them. That failure was not excused by her unsuccessful attempt to obtain the funds necessary to remedy those conditions. (Slip Opinion at 27, n. 16, 144a-145a, n. 16).

contrary decision—that confinement in an isolated "cell"[30] is "more desirable" in order to protect a patient or others from "bruises"—can be reconciled with the duty not to restrain a patient absent "compelling necessity" or the duty to use the "least intrusive treatment available".

Likewise, the Third Circuit's "least intrusive treatment" analysis requires a balancing of the possibility of improvement against the risk of serious side effects in choosing a treatment approach. The court, however, offered no meaningful guidance as to how this test should be applied by professionals in cases involving both risk and possibility of improvement, noting only that "[w]hen the state is the decision-maker . . . such actions should err on the side of safety" (32a, n. 45).[31] Since nearly all treatment involves some risk, this standard places all treatment personnel on the horns of a difficult constitutional dilemma. Moreover, since "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation . . .",[32] this is a dilemma best solved by avoiding risk at all costs, notwithstanding "accepted medical or scientific knowledge".

The Court of Appeals also failed to explain why malpractice becomes a constitutional violation merely because

[30] Cells, of course, exist in prisons, not mental retardation facilities. Thus, the lower court's reference to cells exemplifies its lack of understanding of the subject matter for which it nonetheless prescribed treatment standards.

[31] In contrast, "[w]hen individuals are the decision-makers the law, out of respect for personal autonomy, appears to allow them to err on the side of risk, *see Parham v. J. R.*, 442 U.S. 584, 602-04 (1979)" (32a, n. 45).

[32] *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). See also *Bell v. Wolfish*, *supra* at 520 n. 40.

the victim is committed to an institution for the mentally retarded. See *Estelle v. Gamble, supra* at 106. The Constitution provides no "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. 693, 701 (1976). Yet, the standards created by the Court of Appeals are, for the most part, indistinguishable from state law torts. This result is clearly inconsistent with the holdings of this Court in *Estelle* and *Paul.*

Finally, building upon its misconstruction of state law in *Halderman,* the Third Circuit converted a conceived statutory promise to provide appropriate treatment at Pennhurst into a substantive due process requirement. In so holding, the Third Circuit misconstrued both Pennsylvania law and constitutional requirements.

Under Pennsylvania law, treatment is not the only basis for commitment of the retarded. Rather, the mentally retarded can be committed when they are "in need of care ~~and~~ OR treatment." Pa. Stat. Ann. tit. 50 §4406(a).[33] Clearly, when a person, such as plaintiff, is committed as "in need of care", it is sufficient, under state law, to provide that care.[34]

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[33] In *Goldy v. Beal,* 429 F. Supp. 640 (M.D. Pa. 1976), a three-judge court declared Section 406 to be unconstitutional. Subsequently, a consent order was entered allowing commitment for a mentally retarded individual who is unable to provide "for his most basic need for nourishment, personal and medical care, shelter, self-protection and safety." *Goldy v. Beal,* C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976) (Consent Order). Thus, plaintiff's continued commitment as "in need of care" is wholly consistent with the *Goldy* standard.

[34] See *In Re: Joseph Schmidt,* No. 23 March Term, 1979 (Pa. S. Ct., filed Feb. 5, 1981) (state has statutory duty to provide "care" to the mentally retarded).

As importantly, plaintiff (and most other residents of Pennhurst) is not "capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). Accordingly, the provision of care—"food, shelter, medical care and supervision for which the residents have no other source"[35]—is a proper rationale for commitment and, even under the Third Circuit's substantive due process analysis,[36] provides the minimum constitutional standard of services for the mentally retarded. *Halderman v. Pennhurst, supra* at 125 (Seitz, C.J., dissenting).

Properly viewed, plaintiff's rights at Pennhurst are subject, at most, to an analysis similar to that employed by this Court in *Bell v. Wolfish, supra*. Even more so than prison administrators, those, such as defendants, who supervise the operation of mental retardation facilities are " 'expert administrators' " who should not be " 'second-guess[ed] . . . on matters on which they are better informed. . . .' " *Bell v. Wolfish, supra* at 544. Thus, if their actions are reasonably related to legitimate governmental interests—the provision of care or the effective management of the facility—due process requirements are satisfied.[37]

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[35] *Halderman v. Pennhurst, supra* at 125 (Seitz, C.J., dissenting). See also *Goldy v. Beal*, C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976)(Consent Order).

[36] But see *O'Connor v. Donaldson, supra* at 587-88 (Burger, C.J., concurring); *Morales v. Turman, supra* (existence of a substantive due process right to treatment questioned).

[37] Moreover, the Third Circuit's substantive due process analysis is, at best, questionable. As Chief Justice Burger has noted, there is "no basis for equating an involuntarily committed

The extent of the lower court's error is evident from its attempts to distinguish this Court's holding in *O'Connor v. Donaldson:*

> [Unlike Donaldson, who received no treatment] Romeo has received some treatment; the state's desire to care for individuals incapable of protecting themselves provides an additional justification for confinement; and Romeo [unlike Donaldson] is not seeking release.

(29a-30a, n. 42). Thus, according to the Third Circuit, plaintiff, who received more and who was confined with greater justification, is entitled to far greater constitutional protection than the plaintiff in *O'Connor* because, in this case, plaintiff did not seek his liberty. This is a quantum leap in constitutional analysis which requires review by this Court.

B. After creating new constitutional rights, the court below erred in failing to direct dismissal on the grounds of qualified immunity.

This Court has repeatedly recognized that state officials have a qualified immunity from liability for constitutional violations unless they "knew or reasonably should have known" that their actions violated constitutional rights. See, e.g., *Procunier v. Navarette,* 434 U.S. 555, 561-62 (1978); *Scheuer v. Rhodes,* 416 U.S. 232, 247-

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patient's unquestioned constitutional right not to be confined without [procedural] due process of law with a constitutional right to *treatment.*" (Emphasis in original, footnote omitted.) *O'Connor v. Donaldson, supra* at 587-88 (Burger, C.J., concurring).

48 (1974).[38] As the Third Circuit recognized, this case "inhabits the twilight area of developing law concerning the constitutional rights of the involuntarily committed mentally retarded" (3a). The court went on, of course, to create rights far beyond those considered, let alone, found by any other court.

State "officials cannot be expected to predict the future course of constitutional law".[39] Thus, petitioners cannot be held to have known of the "new 'constitutional torts' manufactured . . . by the Third Circuit. . . ." (75a-76a) (Aldisert, J., concurring).

Accordingly, the failure of the court below to remand to the trial court with directions to dismiss this damage action was clearly erroneous. If the qualified immunity established by this Court is to have any significance, that failure should be reviewed by this Court.

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[38] There was no evidence to support a finding that the defendant supervisors intended to harm plaintiff. Thus, the second branch of the good faith immunity test is not at issue in this case.

[39] *Procunier v. Navarette, supra* at 562. *See also Wood v. Strickland*, 420 U.S. 308, 322 (1975).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1982

ROMEO, NICHOLAS, an incompetent, by his mother and next friend, PAULA ROMEO,

Appellant

v.

DUANE YOUNGBERG, individually and in his official capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, individually and in his official capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, individually and in her official capacity as Unit Director, Unit 9, Pennhurst State School and Hospital

Appeal From the United States District Court for the Eastern District of Pennsylvania
(C.A. No. 76-3429)

Argued January 9, 1979

Before: SEITZ, *Chief Judge*, and
GIBBONS and HIGGINBOTHAM, *Circuit Judges*

Reargued April 28, 1980

Before: SEITZ, *Chief Judge*, and
ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS, GARTH,
HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

(Filed November 24, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

The present controversy inhabits the twilight area of developing law concerning the constitutional rights of the involuntarily committed mentally retarded. Nicholas Romeo appeals, through his next friend, from a jury verdict for the defendants, officials of the Pennhurst State School and Hospital, in a suit brought pursuant to 42 U.S.C. §1983 (1976). Plaintiff alleges trial errors in the admission and exclusion of evidence, in the court's instructions to the jury and in the manner in which the trial was conducted. Because of the improper exclusion of relevant expert medical testimony and critical flaws in the standards that were employed in charging the jury, we vacate the judgment of the district court and remand for a new trial.

While courts in the past decade have carefully focused on the procedural protections applicable to the initial commitment of the mentally handicapped, *see Addington v. Texas*, 441 U.S. 418 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979), relatively little has been resolved with respect to conditions of confinement or the extent of the state's duty to protect and to treat the institutionalized. Specifically at issue here is the judicial responsibility to enforce constitutional guarantees governing the incarceration of the institutionalized retarded.[1] This, in turn, calls

[1] In *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489), this Court held that the mentally retarded have a statutory right to treatment and habilitation, enforceable by a private right of action under the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No.

on us to deal with the question of what standards of proof are required in a §1983 suit for damages, in which a mentally retarded plaintiff claims that the defendants improperly shackled him, failed to provide adequate protection for him, and did not make appropriate treatment available to him. In defining the principles relating to claims for protection and treatment of the retarded, carefully crafted instructions must be utilized that will reflect the duty of courts to safeguard the constitutional rights of those confined, but also will be sensitive to the prerogative of the medical community to exercise its professional judgment and to the undeniable fiscal and administrative concerns of the state.

I.

Romeo is a profoundly retarded person. Although he is physically thirty years old, he suffers from a chemical imbalance of the brain that renders his mental capacity approximately that of an eighteen month old child. For the first twenty-six years of his life Romeo lived with his parents in South Philadelphia. On May 10, 1974 his

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94-103, 89 Stat. 496, 42 U.S.C. §§6001-6081 (1976). Although confinement of the mentally retarded and mentally ill raises many similar problems for constitutional purposes, it is necessary to be careful not to submerge relevant distinctions. As both the district and appellate courts found in *Halderman*, with respect to the individuals housed in Pennhurst:

> The residents are not mentally ill, have broken no laws, and are not a danger to others, although, in severe cases, some are unable to care for themselves. Mental retardation is an impairment in learning capacity and adaptive behavior, and is not treatable, like mental illness, by means of drugs or psychotherapy. While the mentally retarded do suffer educational difficulties, the level of their functioning can be improved by individualized training. 612 F.2d at 92.

father died. Within a month his mother, finding herself unable to care for him, applied to the Philadelphia Common Pleas Court for his admission to a mental retardation facility. On July 11, 1974, the court committed Romeo to the Pennhurst State School and Hospital, pursuant to the involuntary commitment provision of the Pennsylvania Mental Health & Mental Retardation Act of 1966. Pa. Stat. Ann. tit. 50. §4406 (Purdon) (1969).

It is not contested that, while confined at Pennhurst, Romeo was injured on over seventy occasions. These injuries were both self-inflicted and the result of attacks by other residents, some in retaliation against Romeo's aggressive behavior. The injuries included a broken arm, a fractured finger, injuries to sexual organs, human bite marks, lacerations, black eyes, and scratches. Moreover, some of plaintiff's injuries became infected, either from inadequate medical attention or from contact with human excrement that the Pennhurst staff failed to clean up.

Since Romeo is incompetent, this action was brought on his behalf by his mother as next friend. The §1983 complaint seeks damages for the described injuries from three officials at Pennhurst: C. Duane Youngberg, then superintendent, Richard Matthews, director of resident life, and Marguerite Conley, director of the plaintiff's assigned unit at the time most of the injuries occurred. There is evidence which indicates that each defendant knew of some or all of the seventy-plus injuries suffered by Romeo.

After the case was filed, the district court permitted the plaintiff to amend the complaint to include allegations that, since the initiation of the suit, defendants had kept Romeo shackled to a bed or a chair in the hospital at Pennhurst for long periods each day. The amended complaint, which posited a violation of plaintiff's constitutional right

to treatment occasioned by the shackling, exposure to attacks and inappropriate treatment,[2] again sought compensatory and punitive damages from the defendants.[3]

At the time of trial, the district court refused to permit plaintiff's two experts, Dr. Foxx and Dr. Grover, to testify about the lack of programming and activities on Romeo's ward, which they believed accounted for the numerous injuries, and about alternative methods of treatment that would have reduced the frequency of attacks.[4] One of the experts would have testified further that the restraints served no medical purpose and were used solely for the convenience of the staff. The court sustained objections to all of this proffered medical and psychiatric testimony on the theory that admission of such evidence would transform a §1983 action into a malpractice case.[5] In addition, the court rejected the plaintiff's proposed jury

[2] The plaintiff's complaint and the various requests for charge do not describe the exact nature of the constitutional rights asserted by the plaintiff. For example, the plaintiff repeatedly refers to rights under the Eighth and Fourteenth Amendments. Inasmuch as the Eighth Amendment applies only to the states through the Fourteenth Amendment, it is at times unclear whether the Fourteenth Amendment is asserted as a separate legal basis or only ancillary to the Eighth Amendment theory. In any event, we have examined the record and will construe the complaint as asserting that the injuries inflicted on Romeo violated both a substantive due process right and a right to be free from cruel and unusual punishment.

[3] None of the defendants have contended on appeal that these allegations involve matters outside the scope of their assigned responsibilities at Pennhurst.

[4] The court requested an offer of proof and the proposed testimony was summarized out of the jury's presence.

[5] The court, however, did permit defendants to testify that Mrs. Romeo refused to authorize the use of a physical restraint program on plaintiff. Although defendants contended that this

instruction which maintained that the plaintiff had a right to treatment in the least restrictive environment. The court decided instead that defendants' shackling practices and duty to protect Romeo should be evaluated solely on the basis of an Eighth Amendment standard. Further, in what was described as an attempt to distinguish this §1983 suit from a malpractice case, the court subjected plaintiff's claims of inadequate treatment to an Eighth Amendment standard of "deliberate indifference to the serious medical needs of the resident."

Because we believe that the Eighth Amendment—which limits the scope of judicial review of conditions of incarceration for the criminally convicted to a "cruel and unusual" threshold—is inappropriate in the context of civil as distinguished from criminal confinement, the result reached in the district court must be vacated. Moreover, the uncharted legal issues which have arisen and the potential ramifications of this case impel us to set out in some detail the level of judicial scrutiny that should be accorded the intricate set of legal, medical and societal interests that intersect in the situation presented here.

II.

Of critical importance in this appeal is the recognition that this is a due process case, not a controversy to be

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prevented the reduction of Romeo's aggressive behavior, the rejection of a treatment program would not appear, in itself, to be probative evidence with respect to responsibility or liability. An inquiry is needed to determine the suitability of the proposed treatment, whether rejection of therapy is a manifestation of a patient's illness or a consequence of valid concerns of guardians or relatives, and whether reasonable efforts were made either to deal with such rejection or to provide some other suitable treatment. *Cf. Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966).

governed by "cruel and unusual" principles. Although the complaint alleged Eighth as well as Fourteenth Amendment violations, *Ingraham v. Wright*[6] and *Bell v. Wolfish*[7] would appear to preclude reliance on the minimal safeguards of the Eighth Amendment in a non-criminal context. *Ingraham* held that the Cruel and Unusual Punishments Clause is inapplicable in the context of corporal punishment in public schools; *Wolfish* found Eighth Amendment scrutiny inappropriate for evaluating conditions of pretrial detention.[8] Indeed, *Wolfish* explicitly recognizes a right of innocent persons to be free from punishment, a proposition directly grounded in the word "liberty" that appears in the Due Process Clause. *See* 441 U.S. at 535; *id.* at 580 (Stevens, J., dissenting). Thus, it is the Fourteenth Amendment's prohibition of the state deprivation of life, liberty or property without due process of law that is the appropriate fulcrum of our concerns today.

It is necessary, of course, to determine initially whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of life, liberty and property. If the answer to that inquiry is in the affirmative, we must then determine what level of judicial scrutiny is applicable to the various interests in issue here.

[6] 430 U.S. 651 (1977).

[7] 441 U.S. 520 (1979).

[8] See *Ingraham v. Wright*, 430 U.S. at 668-71; *Bell v. Wolfish*, 441 U.S. at 535. Admittedly, *Ingraham* left open the possibility of applying Eighth Amendment analysis to mental institutions, see 430 U.S. at 669 n.37, but the determination in *Wolfish* that Eighth Amendment is inappropriate for analyzing conditions of pretrial detainees indicates rather clearly that a formal adjudication of guilt in a criminal prosecution is a precondition for Eighth Amendment protection.

We are fully cognizant that the propriety of a §1983 claim, in the present situation, turns on whether a constitutional right is at issue. The concurrence is undeniably correct in requiring that we distinguish between constitutional violations and ordinary malpractice claims. But the implication that the existence *vel non* of a state remedy—for example a malpractice action—is relevant to the determination of whether a §1983 claim exists, would appear to be unfounded. *Cf. Paul v. Davis*, 424 U.S. 693, 715 (1976) (Brennan J., dissenting). Nor does the existence of treatment issues in a claim of constitutional infringement, on account of a linguistic similarity, transform the claim into a malpractice action.[9] Admittedly, the plaintiff's confinement in a state institution does not dignify every complaint with constitutional stature. *Cf. Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Nevertheless, there is a distinction for constitutional purposes between conduct by state actors and private citizens. Therefore, understandable concerns with stemming the federalization of common law tort actions, see *Baker v. McCollan*, 443 U.S. 137 (1979), must not overcome a court's duty to safeguard legitimate constitutional rights.[10] As Justice Harlan realized, " 'liberty' is not a series of isolated points pricked

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[9] Plaintiff Romeo stands in a different posture from the ordinary citizen with respect to medical treatment: he is involuntarily confined for the very purpose of treatment or habilitation. *See* pp. 12a, 22a-23a, 34a-36a *infra*. Unlike most members of the community he is not free to seek or reject medical services whenever he pleases.

[10] As the *Halderman* Court noted, although mental health policies have traditionally been within the states' police power, Congressional action in the field was justified by the constitutional underpinnings of the retarded residents' rights to protection and personal security. 612 F.2d at 98.

out in terms of [the Bill of Rights] . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion).

Once a protected interest is found to exist, the proper level of judicial scrutiny is ascertained by the nature of that interest. A court must not be overquick to equate the scope of the right to protection or treatment for the involuntarily confined retarded with the already articulated scope of such rights for the criminally incarcerated.[11] Nor are analogies to state or common law precedents controlling —it is federal law that answers the question of what process is due under the Constitution.[12]

The confinement of an individual to an institution for either the mentally ill or mentally retarded entails a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). In consequence it is circumscribed by

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[11] *See Estelle v. Gamble*, 429 U.S. at 106 (deliberate indifference standard adopted to distinguish medical malpractice cases cognizable under state tort law and those rising to level of constitutional abridgement with respect to prisoners). Although the concurring opinion purports to reject the deliberate indifference standard of *Estelle*, it is not clear that the standard which it advocates for judging constitutionally acceptable conduct—that it "was not a sham or otherwise illegitimate"—provides anything different, or realistically addresses the undeniable distinctions between an involuntarily confined retarded person's right and a convicted individual's right to protection or treatment.

[12] *Cf. Vitek v. Jones*, 48 U.S.L.W. 4317, 4320 (March 25, 1980); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

It should be noted, however, that if plaintiff's claim is not among those rights protected by the Constitution, he may still have a statutory or common law claim adjudicated in the state

due process protections. *Addington v. Texas*, 441 U.S. 418, at 425. And once inside the institution an individual's liberty interest is not summarily extinguished.[13] Rather, those aspects of personal autonomy recognized from the time of Blackstone—the power of locomotion without restraint and the right to personal security[14]—as well as the right to freedom from punishment, require continued respect. These fundamental liberties may be legitimately encroached upon only when justified by an overriding,[15] non-punitive state interest related to the reasons for confinement.

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courts or even in the federal courts under pendent jurisdiction. In *Halderman*, the Court held that retarded persons have both a private right of action under the Developmentally Disabled Assistance and Bill of Rights Act, and a state statutory right to habilitation. *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 97, 103, 107 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489).

[13] *See Wolff v. McDonnell*, 418 U.S. 539 (1973). The aphorism that "There is no iron curtain drawn between the Constitution and the prisons of this country," *id* at 555-56, would appear to carry equal force with respect to institutions for the mentally ill or the mentally retarded.

[14] Monaghan, Of *'Liberty' and 'Property,'* 62 Cornell L. Rev. 495, 411-12 (1977).

[15] *Cf. Bell v. Wolfish*, 441 U.S. 520, 532 (1979), which rejected a compelling necessity standard in holding that the "presumption of innocence" doctrine relied upon by pretrial detainees in that case did not state a sufficiently grave liberty interest to support such a rule. Although the majority in *Wolfish* suggested that even if detainees had relied on the right to be free from punishment, that right would not warrant adoption of the compelling necessity test, *id.* at 539, the situation of the confined mentally retarded is clearly distinguishable. Whereas pretrial detainees are incarcerated pursuant to a judicial determination of probable cause, the involuntarily committed mentally retarded

Courts have reached a general consensus on three legitimate state justifications for the confinement of the mentally ill and mentally retarded. These rationales have evolved historically from (1) the protection of society from individuals who constitute a danger, a concept rooted in the state's police power; to (2) the protection of individuals unable to care for themselves or prone to self-destructive acts, based on police power and *parens patriae* rationales; and finally to (3) rehabilitation—often limited to habilitation in the case of the mentally retarded—also an exercise of the state's *parens patriae* authority.[16] *See Addington v. Texas*, 441, U.S. 418, at 426; *O'Connor v. Donaldson*, 422 U.S. 563, 573-74 (1974).

Noticeably lacking, and logically inapplicable to the mentally retarded, are the traditional deterrence and retribution underpinnings of the criminal system.[17] Obviously, the state has no right to punish an innocent individual, and the concept of deterrence has a minimal effect on a severely retarded person, such as the plaintiff here. In

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are untouched by the criminal process. Moreover, 85% of the detainees were released within 60 days, *id.* at 524, 525 n.3, whereas persons in institutions for the mentally retarded often remain for life. When disabilities imposed in the course of confinement in a mental facility are as severe as shackling, the possibility of punishment—and a right to be free from it—in a constitutional sense, exists.

[16] This is not intended to suggest that a state may involuntarily confine a person solely on grounds of treatment when the individual does not desire any treatment.

[17] *See* In Re *Bally*, 482 F.2d 648 (D.C. Cir. 1973). *See also Bell v. Wolfish* at 539 n.20 and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), which view deterrence and retribution —the traditional aims of punishment—as outside the realm of legitimate nonpunitive governmental objectives.

seeking to explain claimed infringements of fundamental liberty interests, the state is limited to protection and treatment rationales of a compelling or substantial nature. Involuntary commitment in the civil context, then, quite clearly implicates a constitutional right to treatment and protection.[18] Alternatively, if a claimed post-commitment abridgement does not reach the status of a gross deprivation or squarely cut across constitutionally protected liberty interests, but only tangentially implicates such an important interest, a mutual accommodation between institutional objectives and constitutional provisions is needed. This is so since the very nature of an institution requires some limitation on the retained rights of those who are confined. *Cf. Wolff v. McDonnell*, 418 U.S. at 556. In such instances, security concerns, fiscal constraints and administrative necessities may be adduced to demonstrate

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[18] *O'Connor v. Donaldson*, 422 U.S. at 576 and *Robinson v. California*, 370 U.S. 660 (1962), at a minimum stand for the proposition that simple incarceration, outside of the criminal system, is constitutionally impermissible. Of course, the mentally ill and the mentally retarded cannot be segregated into discrete categories of "dangerous to others," "dangerous to self," or "need for treatment." The very fact of an individual's dangerousness is inextricably linked to his/her need for treatment. Both theoretically and practically then, treatment is a right and rationale in every instance of involuntary civil commitment.

However, it should be noted that with respect to Pennhurst, this Court fully adopted the district court's finding that "[t]he residents are not mentally ill, have broken no laws, and are not a danger to others, although, in severe cases, some are unable to care for themselves." *Halderman v. Pennhurst State School & Hospital*, 612 F.2d at 92. The absence of any dangerousness to others only strengthens the state's obligation to provide treatment to such non-threatening individuals once the state undertakes to confine them.

that a claimed encroachment is necessary to a facility's internal operations.[19]

III.

In the present case, Romeo's complaints may be appropriately conceptualized as (1) a right to be free from undue bodily restraint; (2) a right to personal security and protection; and (3) a right to adequate treatment. The first two are undiluted legal concerns, relating to protected liberty interests; as such, they are entitled to heightened judicial scrutiny. The third entails mixed questions of law and medical judgment, and thus requires a more flexible standard of judicial review and suitable deference to informed medical opinion.

The basis of Romeo's first claim, that he was unduly shackled,[20] is clearly inimical to the right of an unconvicted citizen to be free from punishment.[21] Even though shack-

[19] *Wolfish* pointed out that the problems that arise in the day-to-day operations of a state institution are not susceptible of easy solutions. Courts undoubtedly should accord wide-ranging deference to the administrators and physicians in mental facilities with regard to the adoption and execution of policies and practices necessary for internal order and security. Normally, the expertise and responsibility for such operations are located in the legislative and executive branches. But such recognition would appear to be no justification or excuse for the abrogation of legal rights or the abandonment of the judicial obligation to protect such rights. *See id.* 441 U.S. at 541.

[20] The fact that Romeo was shackled is not disputed. *See* App. 1-15a and 1-21a.

[21] Pa. Stat. Ann. tit. 50 §4422 actually forbids shackling, subject to two limited exceptions: (1) during transfer of a patient or (2) by order of the director or his designee for solely medical purposes in accordance with regulations of the department. The record does not disclose that defendants came within either of these two exceptions. *See* App. 1-63a.

ling may not be punishment per se, it raises a presumption of a punitive sanction.[22] It squarely collides with a traditional liberty interests in freedom from bodily restraint.[23] A valid involuntary commitment *ex necessitate* extinguishes a retarded person's right to freedom from confinement. Nevertheless, a residuum of liberty remains which is entitled to due process protection. In *Vitek v. Jones,* which dealt with the transfer of a prisoner from a prison to a mental hospital, the Supreme Court found that an involun-

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[22] Moreover, as *Wolfish* conceded, were a detainee to be shackled and thrown in a dungeon, "it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Id.*, 441 U.S. at 539 n.20.

In the present case, the district court permitted Romeo to amend his complaint to include allegations that defendants had kept plaintiff shackled to a bed or chair in the Pennhurst hospital for long periods of time each day since the initial filing of the complaint. *See* App. 1-15a. Although evidence of retaliation or the subjective motivation of defendants may aid in determining whether there has been punishment or in ascertaining an appropriate remedy, the question whether a constitutional right to freedom from punishment or bodily restraint has been violated should turn on the *character* of the punishment not the *motivation* of the officials. *Cf. Estelle v. Gamble,* 429 U.S. at 116. (Stevens, J., dissenting).

[23] Freedom from personal restraint was essentially all that due process "liberty" meant until the Civil War. *See* Shattuck, *The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property.'* 4 Harv. L. Rev., 365 (1891). This is the same liberty that the Court in *Addington,* 441 U.S. at 425-27, sought to protect by establishing a "clear and convincing" evidence standard for initial commitment proceedings with respect to the mentally ill.

tary commitment to a mental hospital is "qualitatively different from the punishment characteristically suffered by a person convicted of crime." 48 U.S.L.W. 4317, 4321 (March 25, 1980). Despite pre-existing confinement, a substantial, additional loss of liberty occurred, for which the Court required observances of due process safeguards. Similarly, in the situation before us, shackling is not normally within the range of conditions of confinement contemplated in habilitative institutionalization.[24] Neither in *Vitek* nor in the case at hand do the asserted privations inhere in the original rationales for confinement. Because of the fundamental right at issue here, as well as the substantial risk of error[25] and the possibility of significant harm, the proper judicial posture is one of careful scrutiny.[26]

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[24] The analysis here and the reasoning in *Vitek* indicate that courts have a duty to guard against unnecessary personal restraints both at the confinement stage and with respect to later, intramural dispositions, which can range from maximum to minimum security. The Fourteenth Amendment does not cease protecting individuals simply because they are behind institutional gates. In *Halderman v. Pennhurst*, 612 F.2d at 112-13, this Court affirmed a portion of the district court's order mandating limitations on the use of physical and chemical restraints.

[25] In the present situation, the state, in fact, admitted that the use of restraints was subject to a special procedure, requiring, at the least, an order of a physician. App. I-63a. In addition, according to the statute, a physician's order should be supplemented by an order of the institution's director. *See* n.21 *supra*.

[26] *Mathews v. Eldridge*, 424 U.S. 319 (1976), elaborated a three-part balancing inquiry which would indicate the procedural protections required by state action or by a decision such as we have here:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such

Plaintiff requested that his shackling claim be analyzed under the rubric of a "right to treatment under the least restrictive conditions consistent with the purpose of the commitment." In this regard, he submitted the following charge:

> Plaintiff contends that he was shackled to his bed or chair for long periods of time each day after he filed this lawsuit. If you find that he could have been provided treatment under less restrictive conditions than those imposed on him, then you must find that his constitutional rights were violated.

The court, however, gave the following instruction:

> In order to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident. It is only such indifference that can offend the standards of decency required by the 8th Amendment. App. 2-236a—2-237a.

We have already recorded our disapproval of the adoption of the Eighth Amendment standard in the mental

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interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail. *Id.* at 334-35.

The applicable level of judicial review may also be determined by a similar weighing of relevant interests. Here, the individual interest in freedom from shackling is considerable; the risk of erroneous shackling is indicated by the institution's failure to follow its own procedures; and the state has no plausible, independent interest in shackling per se, since the state statute generally forbids such practices.

retardation area. However, we cannot assent as the concurrence suggests, to an analysis which scrutinizes shackling and a right to treatment by a standard that is essentially the same. The Pennsylvania statute generally prohibits such shackling practices, see fn. 21, and similarly, mental retardation professionals have relegated the use of physical restraints to the closets of an earlier age. Logically, Romeo's shackling claim centers on a liberty interest: a right to be free from bodily restraint.

The trial judge, therefore, should instruct the jury that such shackling may be justified only by a compelling necessity, *i.e.*, that the shackling was essential to protect the patient or to treat him. It should be explained that, except in emergency situations, inadequate resources or administrative rationales offer an insufficient basis for intrusions of this kind on a fundamental liberty interest. As the courts have repeatedly proclaimed, "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.), quoted in *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) quoted in *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974). Plaintiff is also entitled to a charge, in the alternative, that to absolve the defendants from liability on the shackling claim it would be necessary to find that shackling was the least restrictive method of dealing with the patient,[27] in light of his prob-

[27] The "compelling necessity" and "least restrictive manner" tests are virtually indistinguishable standards for reviewing the conduct in question. They have been used interchangeably in resolving equal protection, due process and First Amendment claims. *See Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963).

lems and the surrounding environment. A "least restrictive" charge will not only insure that compelling treatment explanations, as opposed to fiscal concerns or staff convenience, were the basis for the shackling, but also that the institution considered and rejected alternative methods of restraining the resident, if some restraint indeed was required.[28]

A comparison with the result that might be obtained by employing the unitary standard proposed by the concurrence is apposite here. Under the standard advanced by the concurrence, the jury would be charged that shackling is permissible so long as there was not "such a substantial departure from accepted professional judgement, practice or standards as to demonstrate that the defendants did not base their conduct on a professional judg-

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[28] While it will be explained later that "least restrictive" analysis does not appear to be an appropriate tool for evaluating ongoing treatment programs, the reservations regarding this standard expressed in §V *infra* are inapplicable to shackling claims. Shackling—a discrete physical act of confinement—is more analogous to an initial commitment than to the administration of an evolving medication program. Courts are competent in judging alternative environmental dispositions, ranging from outpatient services to confinement in a large state facility. *See Halderman*, 612 F.2d 84, 102 (3d Cir. 1979) (Congressional preference in Developmentally Disabled Assistance and Bill of Rights Act for establishing least restrictive standards for personal liberty). Shackling presents a similar question of degrees of physical restriction and is equally amenable to judicial measurement. And just as the Supreme Court sought to protect the substantial liberty interests implicated in an involuntary commitment proceeding by establishing a "clear and convincing" evidence test, see *Addington v. Texas*, 441 U.S. 418, 433 (1979), the comparably tangible and fundamental threat to personal autonomy presented by shackling should be protected by a "compelling necessity" test.

ment." Arguably, such an instruction assumes that physical restraint for the convenience of the staff would constitute a substantial departure from accepted professional judgment. Yet it is not logically evident that concerns of staff convenience are the sort of departures from medical judgment that rise to the level of being a sham or otherwise illegitimate, as defined in the concurring opinion. More fundamentally, although the standard proposed by the concurrence would probably prevent use of shackling as punishment,[29] it would not preclude its use as a substitute for more effective treatment programs. Thus such a standard would fail to give adequate weight to the resident's substantial interest in freedom from bodily restraint. In addition, it would conflict with the thrust of the state's interest as proclaimed in §4422 of the Mental Health and Mental Retardation Act, in prohibiting the use of mechanical restraints except in limited situations.

Our holding that the district court erred with respect to the jury instruction for the shackling claim, and our establishment of a compelling necessity standard for review of such troubling interferences with bodily freedom, necessarily require an additional finding of error in the district court's exclusion of relevant expert testimony. Under the compelling necessity or least restrictive standards of proof, both sides are, of course, permitted to ad-

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[29] Indeed, "there are a number of psychiatrists and psychologists who regard punishment as a legitimate form of therapy and who believe that aversive behavior modification techniques may be freely used to satisfy a patient's right to treat." *Cf.* Schoenfeld, *Recent Developments in the Law Concerning the Mentally Ill—A Corner-Stone of Legal Structure Laid in Mud*, 9 Univ. of Toledo L. Rev. 1, 17 (1977); Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 Yale L.J. 87, 106 (1967).

duce evidence. Although defendants must justify the shackling as the least restrictive means of handling or protecting the individual, the plaintiff may produce evidence, for example, that restraints were utilized largely because of convenience to the staff. Consequently, Dr. Foxx's proffered testimony regarding the inappropriate reasons and counterproductive results connected with the restraint of Romeo, was improperly excluded by the trial court.

IV.

From Colonial times to the present day, the concept of liberty has embraced the "right to be free from and to obtain judicial relief for unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Plaintiff's second claim, the right to protection from attack, undeniably falls within the compass of this right. The record discloses that while confined at Pennhurst Romeo was injured on over seventy occasions. Some of these injuries were self-inflicted, some resulted from attacks by fellow residents, and some may even have been by the staff. The evidence also suggests that the defendants knew, or had reason to know, of some or all of the injuries suffered by the plaintiff. It would be anomalous to find that the right to a secure environment, which federal courts have often intervened to protect in the context of penal institutions, did not extend to facilities for the mentally retarded [30].

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[30] The judiciary has recognized that "our constitutional duties require that the courts be ever vigilant to assure that the conditions of incarceration do not overstep the bounds of federal constitutional limitations." *Campbell v. Beto*, 460 F.2d 765 at 767-68 (5th Cir. 1972) quoted in *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974). *See also Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971). Further,

The scope and nature of the right of the plaintiff to protection from attack is also capable of judicial demarcation. Both the individual's right to personal security and the state's interest in providing care converge to support a right to protection from attack. The state cannot simply confine a person, without more, because he may be a danger to himself or to third parties.[31] Only after the commission of a discrete criminal act and conviction in accordance with procedural protections is incarceration without more warranted. Consequently, in order to survive constitutional scrutiny, involuntary commitment of a mentally retarded person must combine an interest in insulating society from dangerous behavior with a promise, either express or by implication, to care for and treat the individual.[32] Alternatively, the commitment of a retarded person for treatment purposes or because he is unable to care for himself, necessarily entails the provision of care and protection. The *parens patriae* power to provide care and protection is thus inextricably bound up in the invol-

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in *New York St. Ass'n for Retard. Child., Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), the court noted that "One of the basic rights of a person in confinement is protection from assaults by fellow inmates or by staff." Although initial discussion of the right occurred in a prison setting, the court in *Rockefeller* employed the same standard in evaluating the institution for the mentally retarded in that case.

[31] In a somewhat analogous situation *Robinson v. California*, 370 U.S. 660, 666 (1962), held that incarceration on account of mere status is constitutionally impermissible.

[32] Commitment based on reasons of dangerousness to others is, admittedly, more often a concern in confinement of the mentally ill and less likely to be a governing factor with respect to the mentally retarded. As noted in n.18 *supra*, the district court found that none of the Pennhurst residents were dangerous to others.

untary commitment of the retarded regardless of the original rationale for the confinement.

Further, in Romeo's case, commitment was pursuant to Penn. Stat. Ann. tit. 50, Mental Health and Mental Retardation Act of 1966. The state, in confining Romeo, represented that it was "willing and able" to care for him.[33] The statute provides an entitlement to protection[34] which, like other state-created entitlements, is guarded by constitutionally acceptable procedures. The right to protection is not activated by an isolated mishap, or called into question by each bruise that a patient may suffer. But a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right. While no one is guaranteed an injury-proof life, Romeo, as an involuntary committed resident of Pennhurst, had a right to humane care and protection, bottomed both on the Pennsylvania statute and the Constitution.

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[33] Pertinent for present purposes is §4401 which provides: "(c) whenever a court commits any person under any provision of this act, it may commit such person directly to a facility *willing and able* to receive him; otherwise, the court shall commit to a designated local or state facility, or to the Veterans Administration or other agency of the United States upon receipt of a certificate that the person is eligible for such hospitalization and there is available space for his care." (emphasis added)

[34] While both the right to protection and the right to treatment may have characteristics of property entitlements in that they demand affirmative action from the state and are statutorily created expectations, they are also equally intertwined with the original loss of liberty through confinement and related to basic notions of human dignity. Therefore treatment and protection partake of both liberty and property interests, and it seems unnecessary, at least in the present context, to demarcate these rights in a narrow "either/or" fashion.

Institutions for the mentally retarded are rarely "open" facilities. Those involuntarily confined are not free to return home, and indeed, many are bereft to any support by family and friends.[35] This absence of openness or significant community surveillance and oversight underscores the need for the courts to discharge their traditional function of safeguarding constitutional rights.[36]

Therefore, with respect to the protection claim, we conclude that the trial court erred in its charge. It instructed the jury that:

> Under the 14th . . . Amendment, state official at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff.
>
> Plaintiff . . . contends that these defendants violated such a duty to protect him because they were aware of such attacks and failed to take such reasonable steps as [were] required to protect him.
>
> *If you find that the defendants were deliberately indifferent to the medical and psychological needs of [the plaintiff], then you may find that plaintiff's . . . 14th Amendment rights were violated.*

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[35] The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude. *Cf. United States v. Caroline Products*, 304 U.S. 144, 152-53 n.4 (1938). The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process. *See J. Ely, Democracy and Distrust*, 135-79 (1980).

[36] *Cf. Ingraham v. Wright*, 430 U.S. 651 (1977) (openness of schools to public scrutiny ensures effectiveness of common-law remedies in deterring abuses).

> To find for the plaintiff you need not find that the defendants personally participated in any attack upon the plaintiff. If you find that the defendants were aware of repeated attacks upon plaintiff and failed within their sphere of authority to take *reasonable steps* to protect the plaintiff, then you may find that the defendants are liable for a violation of the plaintiff's constitutional right. (emphasis supplied)

As we see it, the jury should be informed that the plaintiff has a right to have his physical safety protected. The plaintiff sought an instruction that defendants had an obligation to "take reasonable steps to protect plaintiff." Chief Judge Seitz maintains that such a charge is virtually indistinguishable from a state malpractice standard. *Infra* at 56a. However, analysis of this particular claim for constitutional purposes would proceed as follows: because this is a fundamental interest—which conflates plaintiff's right to personal security with defendants' duty to protect—if the defendants failed to provide for Romeo's personal security, such failure can be justified, in a §1983 case, only by substantial necessity. Substantial necessity is more appropriate than the compelling necessity standard employed in connection with the shackling claim, for it enables a court and jury to distinguish between isolated incidents and inadvertent accidents, on the one hand, and persistent disregard of patients' needs, on the other.[37] If the defendants disregarded plaintiff's in-

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[37] Such a distinction is neither arbitrary nor unprecedented. In a similar effort at line-drawing, the Supreme Court in *Baker v. McCollan*, 443 U.S. 137 (1979), attempted to give meaning to an earlier pronouncement that "Due process does not require that every conceivable step be taken at whatever cost to eliminate the possibility of convicting an innocent person." Id. at 145, *citing*

juries or failed to take steps to protect plaintiff then they should be liable unless they can offer explanations based on important state interests.[38] However, the least restrictive charge, which is applicable to the shackling claim, is a less meaningful analytic tool in the protection setting because of the very existence of a right to personal security and a duty on the part of the state to protect. We cannot assume that all patients desire and are capable of dealing with the freedoms provided by least restrictive treatment. Moreover, inherent inconsistencies arise in the use of such a concept in the protection area. The least restrictive treatment, which might be the least confining, might provide insufficient protection and care for a particular resident's wants and needs.

In view of the stance we have adopted regarding the plaintiff's right to personal security and protection from attack, we hold that it was error for the district court to exclude the testimony of Dr. Foxx and Dr. Grover con-

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Patterson v. New York, 432 U.S. 197, 208 (1977). In *Baker* the Court found that detention for three days did not constitute a liberty deprivation, but that "mere detention pursuant to a valid warrant in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'" 443 U.S. at 145. Here, we do not require that every conceivable step be taken to prevent a resident from ever becoming bruised. Rather, we recognize that 70 injuries may rise to the level of a cognizable constitutional claim.

[38] For example, the staff might determine that it is therapeutically more desirable to have an admittedly aggressive patient mingling with others instead of confined to an isolated cell. Although this finding would not absolve the defendants of their duty to protect, it might well explain incurring some bruises in the course of a comprehensive treatment goal.

cerning the availability of treatment programs which would minimize the aggressive behavior and attacks that were unnecessarily prevalent at Pennhurst. Such evidence is relevant in enabling the jury to resolve whether the defendants were properly attending to, or overlooking, the right of the plaintiff to protection from attack.[39]

V.

Plaintiff's third complaint turns essentially on a claim of inadequate treatment and a right to treatment in the least restrictive manner. As previously observed, unlike a right to freedom from bodily restraint or to personal security, treatment does not present a purely legal issue. *See* p. 14a *supra.* Questions of a court's relative competence concerning medical decisions and respect for medical judgment, as well as concerns of comity with the legislative and executive branches, place this claim in a different perspective. The move from preventing degrading impositions on human dignity, such as shackling and exposing a resident to continuous attacks, to requiring treatment consonant with individual needs, transfers the court to a subjective realm of decision making. Nevertheless, appropriate deference to medical expertise does

[39] It is questionable whether this testimony would be admissible under the standard advanced by Chief Judge Seitz. Dr. Foxx was prepared to testify that "in his opinion, plaintiff's injuries were a direct result of the lack of programming and activities on the ward." Dr. Grover's opinion was, similarly, that the "excessive and potentially mutilating" injuries were a consequence of inappropriate programming. It is not clear whether either would be ready to testify that the programming was "such a substantial departure from accepted professional judgment" as to constitute "a sham," the test suggested by the concurring opinion.

not diminish the judicial duty to safeguard liberty interests implicated in treatment decisions.

The right to treatment—or habilitation in the case of the mentally retarded[40]—arises when an individual is involuntarily committed, regardless of whether *parens patriae* or police power grounds provide the major premise for the confinement. *See*, pp. 12a, 21a-23a *supra*. A court performs two functions with respect to such a right: it requires that treatment be provided to those who require and are willing to accept it, and it places limits on the

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[40] Although habilitation is the more accurate term for treatment of the mentally retarded this is not intended to negate the possibility of improvement or to convey a static image of the functioning abilities of retarded persons. To the contrary Congress appears to have based the Developmentally Disabled Assistance and Bill of Rights Act, as well as other recent legislation affecting the mentally retarded, on an acceptance of a "developmental view" of the severely retarded now being advanced by retardation professionals. The Senate Report accompanying the Bill of Rights articulates the developmental view, as well as contending traditional views which the Congress rejected. In part, S. Rep. 94-160 at 27-28 says:

> . . . . Finally, there is the view that developmentally disabled individuals are 'diseased.' They are viewed as sick and in need of constant care. This leads to indefinite custodial care. This last model is gradually being replaced by a developmental view of mental retardation. Such a view stresses that all developmentally disabled individuals have potential for learning and growth.
>
> From this developmental model, it follows that custodial care —which is predicated on the assumption that certain individuals are essentially incapable of development—must be rejected. The newer developmental model emphasizes concrete program goals for individuals and therefore encourages evaluation based on specific outcomes.

state's power to impose such treatment on those who do not desire it. A right to treatment does not create a corresponding duty to submit to any treatment whatsoever; such a simple equation would sanction unacceptable invasions of personal autonomy.[41]

At one end of the spectrum, an absolute failure to treat, when treatment is the reason for commitment, raises clear and serious constitutional problems. As the Court noted in *O'Connor v. Donaldson*, 422 U.S. 563 (1974), "where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that courts are powerless to determine whether the asserted ground is present." *Id.* at 574 n.10. In such instances, it is the court's duty to insist on appropriate treatment or that the plaintiff be released.[42] At the other end of the spectrum is the judicial role in dealing with

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[41] *See* Katz, *The Right to Treatment—An Enchanting Legal Fiction?* 36 U. Chi. L. Rev., 755, 766 (1969).

[42] In *Donaldson* the jury found that "Donaldson was neither dangerous to himself nor dangerous to others, and also found that, if mentally ill, Donaldson had not received treatment." *Id.* at 573. Since there was no conceivable ground for confinement and Donaldson sought release, the Court held that Donaldson's constitutional right to freedom had been violated. That case is distinguishable from Romeo's insofar as: Romeo has received some treatment; the state's desire to care for individuals incapable of protecting themselves provides an additional justification for confinement; and Romeo is not seeking release. Admittedly, the situation with a mentally retarded person is different from that of a mentally ill person. Confinement for the latter is frequently of short duration, while confinement of the former is of considerably longer duration. In addition, treatment of the mentally ill may be more central than for the mentally retarded, for whom habilitation may

involuntary treatment which occasions severe intrusions on individual dignity. Nonreversible physical operations, such as a vasectomy, or permanent physical alterations by surgical intervention, such as a prefrontal lobotomy, or the administration of powerful antipsychotic drugs may well constitute fundamental liberty violations.[43] Like shackling, it may be that they should be subject to close court scrutiny.[44] Similarly, the reasons which commend the use of least restrictive analysis with respect to shackling—existence of a judicially assessable, discrete act, which entails a significant loss of individual liberty—may

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be the prime factor. But while the mentally retarded are not curable as such, few are totally untreatable—as may well be the case with some who are mentally ill. Therefore, instances in which no effective therapy exists, and in which treatment would be futile, potentially requiring a *Donaldson*-like release, are more likely to arise with the mentally ill. *Cf.* Schoenfeld, *supra* note 29, at 15-17.

[43] Because of the incomplete state of the record, it is unclear whether the administration of, for example, dangerous psychotropic drugs, which were found to be misused at Pennhurst, see *Halderman v. Pennhurst*, 612 F.2d at 93, is in issue with respect to plaintiff Romeo. In light of the fact that we are remanding this case, which has already consumed considerable judicial time, we deem it appropriate to address the panoply of possible treatment problems that may confront the district court, in order to aid in a speedier disposition.

[44] *Cf. Davis v. Hubbard*, No. C 73-205 (N.D. Ohio, filed Sept. 16, 1980), which undertakes an exhaustive examination of psychotropic drug use in institutions for the mentally ill and suggests that administration of such drugs, as well as *inter alia*, convulsive therapy, sterilization, and psycho-surgery, involve significant invasions of fundamental interests worthy of constitutional protection. Traditional treatments, the court noted, do not implicate these interests to the same degree.

be present in the context of such invasive, involuntary procedures. Since some these procedures may not be present in the case at hand after it is remanded, we do not address the subject in any detail except to note the possibility of its existence. But, whenever unalterable interferences with bodily integrity place deprivations of liberty in issue, the law and not medicine is the ultimate decision-maker.

Once analysis transcends the groundlevel question of treatment *vel non*, however, and settles in the middle ground, legal questions of unconstitutional liberty deprivations begin to merge with medical judgments regarding the appropriateness of the regimen. Inasmuch as we are remanding, *inter alia*, because the district court's improper employment of Eighth Amendment scrutiny resulted in the exclusion of the plaintiff's proffered medical testimony, it is uncertain how the record will develop at trial. However the summaries of medical testimony, offered as proof out of the hearing of the jury, suggest that the trial court may need guidance in a range of situations, involving problems of both intrusive and inadequate treatment. We therefore find it in order to delineate the legal standards and jury charges applicable in the treatment realm.

Where the issue turns on which of two or more major treatment *approaches* is to be adopted, a "least intrusive" analysis may well be appropriate. If the staff decides upon a course of treatment which offers some promise of effectiveness without undue risk to the patient, such decision may well come within the ambit of least intrusive means. If the likelihood of serious side effects does exist, however, and substantial improvement is not reasonably expectable, then such judgments might well present a basis for finding that the course of treatment was not the least

intrusive under the circumstances.[45] In making constitutional judgments in such situations, the court must necessarily depend in large measure on medical evidence. Once the least intrusive regime has been selected, therefore, the application of a constitutional standard of "least intrusive alternative" on continuing treatment programs, which often involve qualitative medical determinations subject to daily, possibly hourly changes, would prove unworkable.[46] The

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[45] Of course, this does not dispose of those difficult mid-range situations which involve both the possibility of improvements and the risk of serious side effects. When individuals are the decision-makers the law, out of respect for personal autonomy, appears to allow them to err on the side of risk, see *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979). When the state is the decision-maker, the converse would seem appropriate: such actions should err on the side of safety.

[46] The significant cases embracing the least restrictive concept as a constitutional principle primarily entail a single legislative enactment or a discrete state action. *See, e.g., Illinois State B. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (statute prescribing number of signatures required for listing on electoral ballot); *Wooley v. Maynard*, 430 U.S. 705 (1977) (statute requiring noncommercial vehicles to bear license plates with "Live Free or Die" motto); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964) (statute prohibiting issuance of passports to all members of Communist organizations); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (statute requiring teachers to disclose all organizations to which they belong or which they support); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (ordinance requiring pasteurization of milk at approved plants within five miles of center of city).

Where the term "least restrictive" has been applied to the mentally handicapped, it has had reference mainly to the initial environmental disposition not to ongoing therapeutic regimes or medical prescriptions. *See Welsch v. Likins*, 550 F.2d 1122, 1126 n.6 (8th Cir. 1977), *aff'g in part, vacating and remanding in part,*

judiciary is not in a particularly advantageous position to determine which of two medications is less intrusive, nor especially competent in assessing present therapeutic benefits versus long-term consequences and side effects for each administration of a drug. Further, least restrictive assumes a direct correlation between restrictiveness and effectiveness, a presumption which can not be medically corroborated in every instance.[47]

Unfortunately, in attempting to craft the appropriate standard to apply to a charge of inadequacy of treatment the courts find themselves in a Scylla and Charybdis situation. On the one hand, the Supreme Court has cautioned that,

> Although we acknowledge the fallibility of medical and psychiatric diagnosis, (citation omitted) we do

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373 F. Supp. 487 (D. Minn. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473, *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974); *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom. Wyatt v. Alderholt*, 503 F.2d 1305 (5th Cir. 1974).

[47] *See* Hoffman & Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 San Diego L.R. 1100, 1141-42 (1977).

In evaluating the meaning of the right to treatment, it is equally important to assess a program in terms of its adequacy—and a highly relevant factor is the resident's opinion of, and reaction to, the treatment he is receiving. It is by no means clear that an individual resident would consider the least restrictive treatment to be the most adequate. *See* Katz, *The Right to Treatment—An Enchanting Legal Fiction?* 36 U. Chi. L. Rev., 755, 780 (1969).

> not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or adminsitrative hearing officer. . . . the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real.

Parham v. J.R., 442 U.S. 584, 609 (1979). On the other hand, the Supreme Court has noted that "The medical nature of the inquiry, however, does not justify dispensing with due process requirements." *Vitek v. Jones*, 48 U.S.L.W. 4317, 4321 (March 25, 1980), *citing Addington v. Texas*, 441 U.S. at 430. Although both these statements refer to initial commitment procedures for the mentally ill,[48] their logic appears equally applicable to judicial review of treatment decisions within institutions for the mentally retarded.

In the present case Romeo was confined pursuant to §406 of the Pennsylvania Mental Health & Mental Retardation Act of 1966, which provides that commitment is for "care and treatment."[49] By basing Romeo's deprivation of liberty at least partially upon a promise of treat-

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[48] *Parham* established minimal procedures consistent with the Fourteenth Amendment for the voluntary commitment of mentally ill minors. *Vitek* prescribed the procedures due before the state can transfer a convicted person from prison to a mental hospital.

[49] (b) If upon examination it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and *treatment*. (emphasis added) Pa. Stat. Ann. tit. 50, §4406

ment, the state ineluctably has committed the community's resources to providing minimal treatment. While Romeo has an entitlement to some treatment,[50] the evidence in the record, although somewhat contradictory, suggests not so much a total failure to treat as an inadequacy of treatment.[51]

Given this situation it would be unrealistic for us to ignore that courts by and large are not in as advantageous

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On July 8, 1976, §4406 was declared unconstitutionally void for vagueness in *Goldy v. Beal*, 429 F.Supp. 640 (M.D. Pa. 1979), although the legislature, in enacting the 1976 Mental Health Procedures Act, P.L. 817 on July 9, 1976 specifically provided that the provisions of the Mental Health and Mental Retardation Act of 1966 (§4401 et seq.) were preserved insofar as they relate to mental retardation or to persons who are mentally retarded. In order to continue commitments constitutionally under §4406 the Department of Public Welfare consented to an October 28, 1976 order of the district court which established standards for involuntary commitment. These standards ("Goldy standards") are legally binding regulations which enhance the §4406 provision. In conditioning commitment on a person's inability to provide for "his most basic need for nourishment, personal and medical care, shelter, self-protection and safety" the regulations represent that such needs will be provided by residential placement. *See* 6 Penn. Bull. 2884 (Oct.-Nov. 1976).

[50] Similar to the right to protection and care, the right to treatment has both a constitutional base—since it forms the ground for the initial liberty deprivation and also a statutory base. It can likewise be analyzed as a liberty interest or property entitlement. *Cf. Brede v. Director for Dept. of Health, Etc.*, 616 F.2d 407 (9th Cir. 1980) (property entitlement to treatment at some state leprosarium).

[51] Of course, if after receipt of the relevant medical testimony on retrial, it is ascertained that Romeo received no treatment during significant periods, then the jury should be charged in accordance with Appendix III A not III B.

a position as the personnel at applicable institutions to make decisions relating to day-to-day or hour-to-hour treatment.[52] Moreover, the evaluation of standards of adequacy and suitability in the psychiatric field is extremely difficult even for trained personnel and certainly in the judicial context. Questions in this field, as the Court in *Addington* noted, often require not only a resolution of complicated factual issues, they turn on the very *meaning* of those facts —a meaning that must be interpreted by expert psychiatrists and psychologists. 441 U.S. at 429.[53] And unquestionably, the gap between available resources and those needed for ideal treatment programs is, unfortunately, considerable. Once minimum treatment needs are satisfied, courts should be cautious in requiring legislatures to allocate resources in a way that may well be more desirable, but not constitutionally mandated.[54]

Consequently, with respect to the claim regarding adequacy of treatment, we agree neither with the plaintiff, that he has a right, insofar as day-to-day decisions are concerned, to judicial review based on a constitutional

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[52] *See generally,* Bazelon, *Foreword,* 57 Geo. L. J. 676-79 (1969).

[53] It has been contended that these medical uncertainties are greater with respect to the mentally ill, on which *Addington* focused, than in the case of the mentally retarded. For constitutional purposes, this difference would appear insignificant, insofar as a "medically reasonable" standard for ongoing treatment decisions would appear proper for both groups.

[54] *Cf. San Antonio Independent School District v. Rodriquez,* 411 U.S. 1 (1973); *Dandridge v. Williams,* 397 U.S. 471 (1970). Although both were Equal Protection cases, they dealt with an analogous question of what constitutes an adequate provision of public services or funds.

standard of least intrusive,[55] nor with the defendants that only deliberate indifference to the medical and psychological needs of Romeo constituted a violation of his right to treatment.[56] It should be made clear to the jury that

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[55] While least intrusive analysis is relatively easily applied when the liberty interest infringed is freedom from bodily restraint, in the case of shackling, or involves conditions of confinement—minimum vs. maximum security—*see Halderman, supra; Eubanks v. Clarke*, 434 F.Supp. 1022 (E.D. Pa. 1977), it merges into questions of medical judgment when the most appropriate method of administering treatment arises. This is not to suggest that such analysis may not be desirable: "least intrusive" may well be the most effective tool for reconciling the treatment needs of individuals, the concerns of libertarians and questions of the proper allocation of limited state funds. Chief Justice Burger's concern in *O'Connor*, that a "right to treatment" might provide a ready excuse for needlessly incarcerating socially undesirable individuals, might well be minimized by the least intrusive approach. 422 U.S. at 589. And the issue addressed in *Addington*, that "the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others," 441 U.S. at 426, which the court found to be inadequately served by use of a weak "preponderance" standard in commitment proceedings, might well be furthered by employment of the least intrusive standard.

[56] It would not appear that the Supreme Court's summary dismissal for want of a substantial federal question in *Sanchez v. New Mexico*, 396 U.S. 276 (1970), dismissing appeal from State v. Sanchez, 800 N.M. 438, 457 P.2d 370 (1969), which held that an admittedly dangerous patient did not have a right to the least restrictive environment, forecloses inquiry into the matter here. Recent Supreme Court decisions have indicated that summary dispositions are not ironclad rulings, and that their precedential force may well be modulated by subsequent doctrinal developments. *See Illinois State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Washington v. Yakima Indian Nation*, 439 U.S.

for the plaintiff to prevail it is necessary to find that an individual involuntarily confined in a facility for the mentally retarded did not receive a form of treatment that is regarded as acceptable for him in light of present medical or other scientific knowledge.[37] The state should be permitted to adduce evidence of security concerns, administrative necessities and fiscal constraints in the course of explaining its adoption of the challenged program. Thus, if defendants can demonstrate a coherent relationship be-

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463 (1973); *Mandel v. Bradley*, 432 U.S. 173 (1977). There have been substantial doctrinal developments since *Sanchez* in the mental health field, ranging from the Court's *O'Connor* decision to the decisions of circuit and district courts recognizing some sort of right to treatment in the least restrictive setting. And in the interim, Congress has also determined that treatment in the least restrictive setting is appropriate to effectuate and protect the rights of the mentally retarded. *See* 42 U.S.C. §§6001-6081 (1976) (Developmentally Disabled Assistance and Bill of Rights Act). Moreover, our declination to recognize an across-the-board constitutional right to treatment in the least restrictive alternative precludes a square conflict with *Sanchez*.

[37] The court's role, in this respect, is somewhat similar to its function when reviewing action by administrative agencies. The standard of review articulated over a decade ago in *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir. 1967), remains valid today: the hospital need not necessarily make the best decision, just a permissible and reasonable one. Intelligent judicial review must rely on a well-reasoned analysis by the institution and a record of its treatment decisions. *Covington v. Harris*, 419 F.2d 617, 626 (D.C. Cir. 1969). Moreover, we recognize that this creates only a narrow judicial guarantee that those confined for treatment and who both seek and require it will receive it. The courts have not, as yet, begun to address whether there is a duty of all involuntarily confined residents to submit to some treatment.

tween a particular treatment program and a resident's needs, they would not be liable.[58]

The standard articulated here may appear, at first blush, to differ minimally from that propounded by the concurrence. However, the concurring opinion's concern with distinguishing the constitutional prohibition against a "substantial departure from accepted professional judgment" from a malpractice standard might lead to an approval of all conduct that is "not a sham or otherwise illegitimate." *Infra* at 66a. We do not believe that such a test can adequately protect a retarded person's acknowledged constitutional right to treatment or habilitation.[59] Nor does the judiciary lack the tools to ascertain whether

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[58] One effective means of resolving complaints regarding treatment programs would be for the institution to provide an internal grievance mechanism with appropriate procedural safeguards. This is not to suggest, however, that a full trial-type proceeding be employed. The adversary character of a full legal hearing is often not suited to the medical determinations at issue in treatment decisions. As the Supreme Court stated in *Parham v. J.R.*, "due process is not violated by use of informal, traditional medical investigative techniques." *Id.* 442 U.S. at 607. Adversary proceedings might well be counterproductive to the establishment of a therapeutic alliance between physician and patient. And the state interest in avoiding disruption and unnecessary intrusion into medical judgments, as well as the patient's interest in impartial diagnosis, may best be served by providing for independent decisionmakers from within the institution. *See Vitek v. Jones*, 48 U.S.L.W. 4317, 4321 (March 25, 1980).

[59] Admittedly, the intent element of "deliberate indifference" is absent, but that aside, the standard propounded by the concurrence guarantees little more than the Eighth Amendment's proscription of callous indifference to the serious medical needs of prisoners.

the constitutional minimum of medical acceptability proposed here is being fulfilled. While earlier courts struggled to weigh conflicting opinions and contending medical theories regarding severely retarded persons, Congress has recently facilitated a court's ability to determine whether a coherent relationship between a treatment program and a resident's needs exists. The enactment of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 provides guidelines, albeit not constitutionally binding, which enhance rational court review.

Should the plaintiff's constitutional claims fail, the recent case of *State of Maine, et al. v. Thiboutot*, 48 U.S.L.W. 4895, 4860 (June 24, 1980), may provide a remedy under 42 U.S.C. §1983 for statutory claims grounded in the Developmentally Disabled Assistance and Bill of Rights Act. The potential availability of such a route for redressing infringements or deprivations of rights established by federal statutes further suggests that we are dealing not with matters of common law malpractice, but with fundamental interests of national import.

VII.

Although the varying standards set forth in this opinion may occasion concern that the issues presented to the jury might appear overly complex, we believe they are meaningful and carefully distinguish varying factual situations. It cannot be gainsaid that the act of shackling a resident is substantially different from the implementation of daily treatment decisions. Likewise, a failure to protect an individual from a sustained series of attacks cannot properly be equated with a failure to choose a particular technique for habilitation. Accordingly, special effort should be employed to ensure that juries can intelligently

grasp the differences. Such an effort is not completely novel in the law. It takes place, for example, in areas of negligence law, immunity law, and admiralty law. We do not, therefore, share the concern expressed by the concurring opinion that district court judges or juries will be unable to understand these distinctions. Moreover, it is reasonable to expect that future plaintiffs will have grounds for raising only one or two of the claims analyzed here, thus further simplifying the difficult task. In any event, it would be a disservice to an injured person who claims to have been abused during a period of involuntary institutionalization to lump indiscriminately a variety of constitutional violations for the sake of beguiling simplicity. Such oversimplification, so handy in political debate, often lacks the precision necessary for resolving complicated legal questions.

Inasmuch as it is still unclear how the evidence will emerge at the retrial, we have set forth in an appendix what may provide a beginning point for a set of jury instructions in a matter of this type.[60] Of course the specific instructions submitted to the jury must be carefully structured to reflect the actual record that is developed on remand.

VIII.

Because we have already ruled that a new trial is required, we need not decide whether the other errors raised by plaintiff concerning the method in which the trial was

[60] There has been no suggestion or argument made in this case regarding the possibility of different standards for the compensatory and punitive damages claims. While it may be desirable to differentiate such charges and to require explicitly a knowledge or state of mind element in punitive claims, the development of such distinctions must await a more fully adumbrated record.

conducted are themselves grounds for a new trial. However, we believe that a comment on the trial court's approval of dual representation for the defendants is in order. At a final pretrial conference, the attorney who had appeared for all the defendants, as a result of an insurance agreement, requested that both he and the deputy attorney general, who represented the defendants as state employees, be permitted to act as counsel during trial. The district court ruled in favor of this joint participation. In order to explain the presence of both attorneys, the court suggested that insurance counsel identify himself as the attorney for Dr. Youngberg, and that the deputy attorney general identify himself as counsel for defendants Matthew and Conley. The jury was so advised, and heard two sets of opening and closing statements, as well as double cross-examinations, although no separate legal interests or conflicts among defendants were asserted or surfaced.

On remand, the district court should make some ruling on this issue. If it determines that dual representation is permissible, it should set forth supporting reasons.[61] Moreover, the practice of permitting counsel to make deliberate misstatements to the jury, even for the purpose of concealing the existence of liability insurance coverage, is of dubious propriety and should not be repeated.

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[61] This written response to any objections of the plaintiff may well include consideration of relevant local rules limiting the number of attorneys who may participate, *e.g.*, E.D. Pa. Local R. 33 (a), especially where, as here, representation is joint rather than several. Because the complaint sought money damages from the defendants in their individual, not official, capacity, the Attorney General's duty or option to defend lawsuits against state emloyees may be no different in such an instance from that of an insurance carrier under a contract.

IX.

In order to appreciate the full problem posed by this case, it is important to note that the Supreme Court has recognized a common law of qualified immunity protecting officials and employees from civil liability for acts performed in the discharge of duties imposed upon them. Such immunity is available even when constitutional rights have been transgressed, if the official or employee was not aware, or had no reason to be aware, of such rights. As the Supreme Court explained in *Wood v. Strickland*, liability for damages for every action which is found subsequently to have been violative of a person's constitutional rights and to have caused injury would unfairly impose upon administrators the burden of mistakes made in good faith in the course of exercising discretion within the scope of official duties. 420 U.S. 308 at 319 (1975).

Because of the evolving nature of the rights in issue here, it may well be that the defendants did not know of them or had no reason to know of them—governmental officials are not "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. 547, 557 (1967). Institutional administrators are entitled to rely on traditional sources for the factual information incorporated in their policy decisions, and when faced with behavior causing or threatening disruption, have an obvious need for prompt action and judgments, which can only be based on existing knowledge. *See Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974). Accordingly, when this matter is remanded for a new trial, the trial judge should instruct the jury regarding the possibility of immunity[62] with

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[62] *See* Trial Transcript, Vol. 8, p. 21. It should be noted that in the original class action litigation alleging state and federal

the caveat that defendants' reasonable belief is to be judged at the time their actions were taken. The jury should further be charged that the defendants are not responsible for unforeseeable developments in the law.

X.

The deplorable conditions at Pennhurst and the manifold problems and anguish that those conditions spawned have been addressed in *Halderman v. Pennhurst.* The present litigation deals with the more discrete problems facing individual patients and their relationships with officials and employees of the institution. More particularly, it relates to the constitutional rights possessed by such citizens and the responsibilities and duties of officials and employees who are claimed to violate such rights.

Unfortunately, these constitutional rights have not always been clearly perceived, and even when recognized the description of such rights, their articulation, and their application to particular factual patterns has only slowly emerged. Even today, the process is still in its early stages.

The difficulty of the task—and it frequently is difficult to describe with exactitude the contours of developing constitutional protections—is further complicated because the applicable medical disciplines are themselves still

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statutory as well as Constitutional violations and involving an admittedly different set of Pennhurst officials and plaintiffs, the district court found that "the defendants have met their burden of convincing us by a preponderance of the evidence that they are entitled to the good faith immunity from damages afforded to such officials in connection with the injuries suffered by the named plaintiffs." *Halderman v. Pennhurst State School and Hospital,* 446 F.Supp. 1295, 1324 (E.D. Pa. 1977) *aff'd and modified,* 612 F.2d 84 (3d Cir. 1979).

in their formative period, and because the resources available to the states are so limited. Nonetheless, where valid rights of citizens are at stake, the courts may not shirk the task of seeking to spell out the elements and details of such rights as carefully as possible.

To the extent that in the past we may have invoked inapplicable analogies, we should be forthright enough to admit the error and to seek to rectify it. To the extent that utilization of other concepts, though appealing, is found to be impractical, we should continue the quest for standards that are realistic and reflective of the changes that are still taking place in psychiatry, psychology, sociology and other related fields that so greatly affect the problems of the retarded.

And we should be cautious in establishing rules that would visit serious financial liabilities on administrators, who, when they performed the acts in question, were not aware of the new standards of rights and responsibilities subsequently formulated by the courts or the new scientific advances that have been achieved to minister to persons who are mentally retarded.

XI.

The judgment of the district court will be vacated, and the case remanded for a new trial.

APPENDIX

I. SHACKLING

If you find that the plaintiff was shackled against his will, and defendants knew or had reason to know of such conduct, you may find the defendants liable unless they can offer compelling reasons for this action. If the defendants satisfactorily explain that it was necessary to shackle the plaintiff for his own protection or for treatment purposes, then they may not be liable. However, it must be demonstrated that the shackling was the least restrictive means of handling the resident — that other, less severe measures had been tried or considered and found unworkable. Only compelling reasons relating to the treatment or the protection of the resident are permissible justifications for shackling.

II. PROTECTION FROM ATTACKS

If you find that the plaintiff was harmed by a series of attacks, and the defendants knew or had reason to know of them, then you may hold the defendants liable. If the defendants knew or had reason to know of these attacks, then only if they provide substantial reasons which explain that the attacks occurred despite their attention will they be deemed to have fulfilled their duty to care for and to protect the plaintiff. Substantial explanations have to do with promoting the treatment or protection of the plaintiff. For example, if the staff considered it important, for therapeutic purposes, to have the resident mingling with others instead of confined to an isolated cell, even though some risk of injury existed, you may consider that to be a substantial explanation. But overcrowded conditions or inadequate staffing patterns may not justify the injuries.

III. ADEQUATE TREATMENT

A. If you find that the plaintiff was involuntarily committed for treatment, and no treatment was administered, and no compelling explanation for the lack of treatment was offered, you may hold the defendants liable.

B. If you find that the plaintiff has received some treatment, you must then determine whether the treatment is regarded as acceptable in the light of present medical or other scientific knowledge. If you find that it is not acceptable, you may find for the plaintiff. In addition, if the evidence does not demonstrate that there is a relationship between the treatment administered and the plaintiff's needs, even if the treatment is arguably regarded as acceptable in other situations, then you may find for the plaintiff. In deciding upon the adequacy of the treatment program adopted you may consider the defendants' explanations regarding security concerns, administrative necessities and fiscal constraints.

C. If you find that a selection of a mode of treatment subjected the plaintiff to significant deprivations of liberty, then you must go on and determine whether that decision provided for the least intrusive treatment available under the circumstances. If the defendants considered other alternatives and ascertained that the program adopted was the least intrusive available, then you should find the defendants not liable.

SEITZ, *Chief Judge*, concurring, with whom Judges Aldisert, Rosenn, and Garth join.

I agree with the majority that the judgment of the district court must be vacated and the case remanded for a new trial because of the exclusion of relevant expert testimony and the use of improper legal standards in the charge to the jury. I also agree with the majority that this case is governed by the due process clause of the fourteenth amendment and not by the eighth amendment. I write separately because of a pervasive disagreement with the majority with regard to the standards that should be employed in charging the jury on remand.[1]

I.

Pennhurst is not unfamiliar to this court. *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979) (in banc), *cert. granted*, 100 S. Ct. 2984 (1980), was a class action on behalf of the residents of Pennhurst challenging the practice of institutionalizing the mentally retarded. Plaintiff Nicholas Romeo is a member of that class, and the defendants here are also defendants in *Halderman*. A majority of this court held in *Halderman* that federal and state statutory provisions granted the residents of Pennhurst a right to treatment in the least re-

[1] The existence of a qualified immunity defense is not raised on this appeal. Consequently, I will not address this question even though it is discussed in the majority opinion.

I also emphasize that, as the majority appears to concede, this appeal does not present claims involving nonreversible surgery or the administration of antipsychotic drugs. Therefore, in my view the majority opinion would not be controlling if such claims were asserted in other litigation.

strictive environment. *See* 612 F.2d at 104-07; Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6001-6081 (1976); Mental Health & Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§4101-4704 (Purdon 1969). The court remanded for an individualized determination of what type of environment, institutional or otherwise, best suited each class member's needs. The majority did not have to reach the constitutional issues presented by the plaintiffs.

This suit presents legal issues that take the next step beyond *Halderman*. The plaintiff alleges that while confined at Pennhurst he was deprived of his rights under the eighth and fourteenth amendments of the Constitution.[2] The defendants are state officials who had policymaking and supervisory responsibilities at Pennhurst when the alleged constitutional violations occurred. They are charged by the plaintiff with failing to adopt policies and procedures that would protect the plaintiff from attacks by other residents and staff. The plaintiff also claims that the defendants violated his constitutional rights after his transfer to the Pennhurst hospital building by causing him to be physically restrained for long periods of time and by refusing to provide adequate treatment. The violations after the plaintiff's transfer to the hospital building were allegedly to punish him for filing this suit. Although the theory of the plaintiff's complaint is not entirely clear, the defendants are apparently charged with direct liability

[2] The procedures used to commit the plaintiff are not at issue here. *See generally Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979). Nor is it significant that the plaintiff's mother, and not the state, applied for his commitment. *See Halderman*, 612 F.2d at 94. Accordingly, those factors have no bearing on the analysis that follows.

rather than vicarious liability for the conduct of other state employees supervised by them. The plaintiff's complaint requested injunctive relief as well as damages against the defendants in their official and individual capacities, but only the damage claims against the defendants in their individual capacities are raised on this appeal.

II.

The majority establishes a multilevel series of standards to govern the plaintiff's claims. First, with respect to the protection claim, the majority holds that failure of the defendants to provide for the plaintiff's safety can be justified only by a showing of substantial necessity. Second, because physical restraint "raises a presumption of a punitive sanction," it can be justified only by a compelling necessity. In addition, the majority holds that the plaintiff is entitled to an instruction that the defendants must show that restraint was the "least restrictive method of dealing with the patient, in light of his problems and the surrounding environment." Third, the majority divides the treatment claim into three categories. If the jury finds that no treatment was administered, it may hold the defendants liable unless they can provide a compelling explanation for the lack of treatment. If some treatment was administered, the defendants will not be liable if that treatment was "acceptable in light of present medical or other scientific knowledge. . . . Thus, if defendants can demonstrate a coherent relationship between a particular treatment program and a resident's needs, they would not be liable." Finally, "least intrusive" analysis applies to the selection of a treatment approach if the jury finds that the approach subjected the plaintiff to "significant deprivations of liberty."

These standards are unnecessarily complex, and they undoubtedly will cause confusion. This complexity and confusion will affect both the ability of a jury to meaningfully assess liability and the ability of state officials like the defendants to effectively conform their conduct to these standards. The jury will be forced to make artifical distinctions between what are in reality related issues. Moreover, the jury must give essentially similar standards the distinctive meanings envisioned by the majority. For example, even if the jury can meaningfully differentiate between compelling necessity and substantial necessity, it is unlikely that it can do so in the manner contemplated by the majority, *i.e.*, as a way "to distinguish between isolated incidents and inadvertent accidents, on the one hand, and persistent disregard of patients' needs, on the other."

The majority's multilevel standards also will inject complexity and confusion into the work of state officials who, like the defendants, have policymaking and supervisory responsibilities at institutions like Pennhurst. These officials will have to formulate policies and procedures to ensure that the institution's residents are (a) protected from attack unless some *substantial necessity* justifies the lack of protection, (b) left unrestrained unless some *compelling necessity* justifies their restraint, and (c) treated with various methods that may, depending on the circumstances, have to be based on *accepted medical or other scientific knowledge* or be the *least intrusive treatment available.*

Furthermore, in the unlikely event that state officials are able to formulate appropriate policies and procedures under the different standards, they still may be uncertain as to what standards govern their conduct. Treatment programs, for example, could be governed by more than

one standard. Testimony at the trial indicated that some behavior modification programs utilize "timeout" principles involving periodic mechancial restraint of the limbs to eliminate aggressive behavior. It is not clear whether such a program has to be the least intrusive alternative or only be acceptable in light of present medical or other scientific knowledge.

This complexity and confusion is unnecessary. In some situations the development of multilevel standards may be unavoidable. I do not believe, however, that such standards are required in this case to accurately differentiate the factual and legal issues presented. As will be noted below, the plaintiff's claims are interrelated, and it is unrealistic to treat them as discrete questions. Protection, restraint, and treatment are not severable issues in the context of the institutionalized mentally retarded. I believe that a single standard can be established to protect the constitutional rights of committed persons while recognizing the legitimate interest of the state.

III.

It is important to examine the relevant constitutional principles before formulating a standard to govern the issues presented in this case. Initially, I agree that conditions of confinement of the mentally retarded are subject to due process scrutiny. Government action that infringes liberty interests is subject to scrutiny under the due process clause and, at a minimum, it must be supported by a legitimate state interest. A mentally retarded person does not lose this protection merely because he is institutionalized.

This is not the end of the matter, however. Institutionalization by definition entails some restrictions on

the personal liberty of committed individuals. As I noted in *Halderman*, I believe that "the state's willingness to provide the residents with such necessities as food, shelter, medical care, and supervision, for which the residents have no other source, forms an adequate basis for some state-imposed restrictions on their liberty." 612 F. 2d at 125 (Seitz, C.J., dissenting). The questions that remain, of course, are the degree to which personal liberty can be infringed and the duties owed by the state to residents of its institutions.

The state may not confine a mentally retarded individual unless it has at least a legitimate purpose for doing so. Because the state can confine an individual only for certain purposes, the conditions of that confinement must bear a reasonable relationship to those purposes. As the majority notes, three state interests traditionally have been advanced to justify commitment of the mentally disabled: danger to others, danger to self, and the need for care or treatment. When analyzing these state interests it is tempting to speak of them as being analytically distinct. In reality, they represent a finely meshed interaction of state interests and patient needs. This is especially true in the context of postcommitment issues. For example, it is somewhat artificial to speak of danger to self as being distinct from the need for care or treatment. The very fact that an individual is dangerous to himself means that he needs care and treatment. Similarly, the need for a safe environment, which is raised by the plaintiff's protection claim, implicates all three interests. Some of the plaintiff's injuries are the result of retaliation by other patients for his attacks on them, and this retaliation has a double effect: it makes the plaintiff's environment physically unsafe and it tends to impede his maximum development. Although

the three interests are not entirely coextensive, this interrelation must be kept in mind when employing legitimate state interest analysis.

With this view of state interests and patient needs in mind. I believe that the plaintiff has a constitutional right to minimally adequate care and treatment. The existence of a constitutional right to care and treatment is no longer a novel legal proposition. *See, e.g., Donaldson v. O'Connor,* 493 F.2d 507 (5th Cir. 1974), *rev'd on other grounds and remanded,* 422 U.S. 563 (1975); *Rouse v. Cameron,* 373 F.2d 451 (D.C. Cir. 1966). Although the seminal right-to-treatment cases were concerned only with the mentally ill, recent cases have extended this right to the mentally retarded. *See e.g., Welsch v. Likins,* 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974).

It is important to remember, however, that insofar as a constitutional right to treatment is concerned, there are critical differences between the mentally ill and the mentally retarded. *Cf. Kremens v. Bartley,* 431 U.S. 119, 135-36 (1977) (in defining appropriate class in rule 23 action challenging state commitment statute, court must pay careful attention to differences between mentally ill and mentally retarded. For example, this court noted in *Halderman* that "[s]trictly speaking, since mental retardation is not a curable disability, the term 'treatment' is inappropriate. Rather, 'habilitation,' which refers to 'that education, training and care required by retarded individuals to reach their maximum development' . . . is the more appropriate term." 612 F.2d at 95 n.14 (citation omitted). It is in this sense that I use the term "treatment" in this opinion. In addition, profoundly retarded persons such as the plaintiff are generally unable to provide them-

selves with food, shelter, and clothing as well as basic protection from other persons and physical hazards. Thus, the danger rationales justifying commitment of the mentally retarded are often quite different from those justifying commitment of the mentally ill.

The state does not contest that it has placed the plaintiff in Pennhurst to provide basic care and treatment. Indeed, he has a right to treatment under state law, *see Halderman*, 612 F.2d at 100-103, and the fact that Pennhurst has programs and staff to treat patients is indicative of such a purpose. I believe that when the purpose for confining a mentally retarded person is to provide care and treatment, as is undoubtedly the case here, it violates the due process clause to fail to fulfill that purpose. With the above considerations in mind, I will now examine the contours of the constitutional right to care and treatment in the context of each of the plaintiff's claims.

IV.

A. Protection Claim

The plaintiff's first claim is that the defendants violated his constitutional rights by not adopting policies and procedures that would protect him from attacks by other residents and Pennhurst employees. In its charge to the jury on this issue, the district court stated that the defendants could be held liable only if they were "deliberately indifferent to the medical and psychological needs of [the plaintiff]." The plaintiff argues that the district court erred in using this language. The phrase "deliberate indifference" derives from *Estelle v. Gamble*, 429 U.S. 97 (1976), in which the Supreme Court held that deliberate indifference to the serious medical needs of prisoners "constitutes the 'unnecessary and wanton infliction of pain'

proscribed by the Eighth Amendment." *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.)). The question presented here is whether this eighth amendment standard is a correct statement of the duty imposed by the due process clause to care for and to treat the institutionalized mentally retarded.

The constitutional right to care and treatment means that the defendants must provide a "basically safe and humane living environment." *Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978). This duty includes reasonable protection from attacks by other residents and staff. At a minimum, the defendants have an affirmative obligation to discover the needs of mentally retarded patients for protection and to respond to those needs in an adequate manner. Because the deliberate indifference standard is not proper method to implement these affirmative due process requirements, use of such language in the charge was reversible error.

The plaintiff contends that the correct legal standard is that the defendants must take reasonable steps to protect the plaintiff. This standard, however, is virtually indistinguishable from the standard that would apply in a state malpractice action. Some courts have analogized to common-law tort principles in adopting the standard of care for a section 1983 claim. *See, e.g., Whirl v. Kern*, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). However, the Supreme Court has exhibited concern in an eighth amendment context about turning every state malpractice claim into a constitutional violation. *See Estelle*, 429 U.S. at 106 ("deliberate indifference" standard used to distinguish constitutional violations from medical malpractice). Constitutionalization of state torts is equally

a concern in due process analysis. *See, e.g., Paul v. Davis,* 424 U.S. 693 (1976); *United States v. Delerme,* 457 F.2d 156 (3d Cir. 1972). Adoption of the standard requested by the plaintiff would make section 1983 coextensive with malpractice claims when state action is present.

Distinguishing constitutional violations from ordinary malpractice claims is especially difficult in the present case because care and treatment often involve issues similar to those presented by malpractice actions. Nevertheless, I believe that this distinction should be maintained in order to confine the jury to constitutional deliberations. It is true that some malpractice claims may also rise to the level of a constitutional violation. This does not mean, however, that liability under section 1983 should be coextensive with liability in state malpractice actions. The fourteenth amendment was not intended to remedy every tort violation in which there is state involvement. Section 1983 itself places limitations on the constitutionalization of state tort claims by requiring that plaintiffs be deprived, under color of state law, of a right secured by the Constitution and laws of the United States. Strict adherence to these requirements prevents section 1983 from becoming a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. at 701.

Because federalism principles are implicated here, I believe that a further limitation is necessary. Under these circumstances I would hold that allegations of constitutional violations based only upon mere malpractice do not state a cause of action under section 1983. *See Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077, 1081 (3d Cir. 1976) (neglect, carelessness, or malpractice without more does not establish constitutional violation under

§1983); *Harper v. Cserr*, 544 F.2d 1121, 1124 (1st Cir. 1976) (section 1983 would not afford relief for complaint alleging negligence or malpractice). This construction of the statute implements the objectives of section 1983 without encroaching on interests that are only a matter of state concern. It must be remembered that with respect to the institutionalization of the developmentally disabled, the Constitution only establishes minimum standards below which the state's conduct may not fall. Although common-law tort principles may provide a useful starting point in formulating the appropriate standard of care under section 1983, they cannot be determinative of the constitutional issue.

In developing a standard to assess whether the defendants have infringed the plaintiff's constitutional right to care and treatment, it is also important to keep in mind the nature of the conduct that will be evaluated by the jury. The question of how best to treat the mentally retarded is a hotly debated subject among experts, and the answers most likely will change over time with the acquisition of new knowledge. Although the statutes in *Halderman* required us to enter the debate, I believe that such a debate should not be elevated to constitutional proportions. A statute is relatively easy to change but the Constitution is not. In my view, the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made. *Cf. Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1342-44 (1974) (discussing use of an administrative law model to ensure that court does not engage in evaluating various psychiatric theories).

Although I have indicated that the care and treatment of the institutionalized mentally retarded must be left largely to the appropriate professionals, some judicial scrutiny is essential if the right to care and treatment is not to become meaningless. As I noted previously, the defendants must discover the needs of the institution's residents and, if action is necessary, respond adequately to those needs. Once the defendants have taken action, or have chosen not to act, it must be determined whether their conduct satisfies the Constitution.

I would hold that the jury should be instructed that the defendants are liable if their conduct was such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment. This is not a malpractice standard. By "accepted professional judgment" I do not mean some standard employed by a reasonable expert or a majority of experts in the community, as state malpractice actions would require, but rather that the choice in question was not a sham or otherwise illegitimate. The jury is to decide only whether the defendants' conduct had some basis in accepted professional opinion. Furthermore, unlike state malpractice actions, a departure from accepted professional judgment must be substantial to give rise to liability. Although violations of the standard that I have developed would probably contravene state malpractice standards as well, this does not mean that the two standards are coextensive. The "substantial departure from accepted professional judgment" standard effectively distinguishes between conduct that violates the minimum requirements of the Constitution and conduct, such as ordinary malpractice, that does not.

Instructions consistent with the previous paragraph properly balance the plaintiff's constitutional right to minimally adequate care and treatment against the legitimate interests of the state. Thus, with regard to the plaintiff's claim that the defendants failed to adopt policies and procedures that would adequately protect him from attacks by other residents and staff, the jury should be charged in accordance with the "substantial departure from accepted professional judgment" standard. The district court's charge is inconsistent with this standard, and it improperly excluded expert testimony relevant to the above inquiry.

B. *Restraint Claim*

In his second claim, the plaintiff alleges that the defendants violated his constitutional rights by causing his freedom of movement to be restricted through the use of various mechanical restraints while he was confined in the Pennhurst hospital building.[3] The majority holds that the least restrictive alternative standard applies to this claim. I believe that this standard does not represent what the Constitution requires as a minimum for a number of reasons. In *Halderman* this court held that the residents of

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[3] Testimony at the trial demonstrated that the plaintiff was restrained in three different ways. When restraints were used the plaintiff was generally in "soft restraints." These restraints allow limited freedom of movement and confine a resident to the same area by securing his arms or legs to a chair or bed. Sometimes metal shackles were used on the plaintiff. This type of restraint consists of a metal wrist or leg band to which a leather belt is attached. The leather belt is tied to a chair or bed to restrict the resident to that particular area. Finally, the plaintiff was occasionally restrained by a leather muff around his hands. *See* Trial Transcript, vol. 4, at 170-71; vol. 7, at 50-56.

Pennhurst have a right to treatment in the least restrictive environment under the Developmentally Disabled Assistance and Bill of Rights Act and the Pennsylvania Mental Health & Mental Retardation Act of 1966. However, *Halderman* rested solely on statutory grounds and the present case involves the Constitution.[4] Furthermore, the least restrictive alternative standard is inappropriate here for a far more fundamental reason.

The major issue in *Halderman* was whether institutionalization was per se illegal. Although we referred to the living conditions at Pennhurst, the main issue in *Halderman* was *where* the members of the class should be treated. That question is not presented in this case. *See* note 2 *supra*. The only question here is whether, assuming institutionalization is legal, the actions taken within the institution satisfy the Constitution. Regardless of the validity

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[4] The holding in *Halderman* that the Developmentally Disabled Assistance and Bill of Rights Act was enacted under §5 of the 14th amendment does not mean that the legal standard of that statute—the patients have a right to treatment in the least restrictive environment—controls the disposition of the constitutional issues here. *See Halderman*, 612 F.2d at 98. In *Halderman* we held only that the statute was a permissible exercise of Congress' §5 enforcement power. The distinction between §5 and §1 of the 14th amendment is crucial because Congress may proscribe conduct that a court would not find unconstitutional. Indeed, the test under §5 is that normally associated with the necessary and proper clause. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966). Thus the court's holding in *Halderman*, which relied on *Katzenbach v. Morgan* (see 612 F.2d at 98 & n.18), merely means that the standard in the Developmentally Disabled Assistance and Bill of Rights Act is permissible under the necessary and proper clause. The test normally associated with the necessary and proper clause, however, is not an appropriate method of analyzing what due process requires as a minimum.

of least restrictive alternative analysis in other facets of treatment of the mentally retarded, it simply has no applicability to conditions within an institution.

Implicit in the least restrictive alternative theory is the notion that the state's only interest in institutionalizing a person is treatment. *See, e.g., Wyatt v. Aderholt,* 503 F.2d 1305, 1313 (5th Cir. 1974) (state interests other than treatment are "trivial" compared to massive curtailment of liberty involved). *But see Morales v. Turman,* 562 F.2d 993, 998 (5th Cir.) (questioning this and other aspects of *Wyatt*), *rev'd and remanded on other grounds,* 430 U.S. 322 (1977) (per curiam). I believe, however, that this gives inadequate recognition to the subtle interrelation of the various state interests involved.

As already noted, the three state interests normally associated with confinement of the developmentally disabled—danger to others, danger to self, and need for care or treatment—overlap and mesh together to some extent in this context. This is especially true as to actions taken within the institution, where decisions about proper care or treatment often must be made on a day-to-day basis. The least restrictive alternative test gives inadequate recognition to this fact. Because the state's interests are rather complex, a particular mode of care or treatment may serve one state interest but not another. For example, physical restraints may serve short-run safety needs but not long-run habilitation needs. By focusing on the "best" care or treatment through a rather rigid view of the state interests, least restrictive alternative analysis tends to obscure the true nature of the state interests. Because the standard to be applied must give recognition to the interplay of the various interests, I believe the majority's test is an inap-

propriate standard for constitutional purposes. In short, even if least restrictive alternative analysis provides an appropriate framework for answering the question of where to place the mentally retarded, it is simply too rigid a tool once we leave that question and focus on conditions of care and habilitation within a particular institution.

Moreover, the least restrictive alternative standard is not easily transferable from the context in which it originated to the situation presented by this case. The standard evolved from the less drastic means analysis formulated by the Supreme Court in cases involving free speech. *See, e.g., Shelton v. Tucker,* 364 U.S. 479 (1960). Since its first exposition of the less drastic means doctrine, the Supreme Court has been rather cautious in using the doctrine because some less drastic alternative almost always exists. If used without caution, the doctrine could invalidate almost any state action. *See generally Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464, 472 (1969).

These difficulties can be avoided where there is one, objectively ascertainable less drastic means. *See* Richardson, *Freedom of Expression and the Function of Courts,* 65 Harv. L. Rev. 1, 40 (1951). This single, objective alternative simply does not exist in the care and treatment of the mentally retarded because what is the best care or treatment at any given time may be a subject of great professional debate. Thus, judges and juries likely will not be able to make a single, objective determination. Furthermore, because a mentally retarded individual's needs change over time, the least restrictive alternative standard

will in effect require continuing evaluation of the "best" method, not a single determination. Although Congress or the states may adopt this standard as part of a statutory scheme, such difficulties caution against use of the doctrine as a constitutional matter. Thus I disagree with the majority's application of the least restrictive alternative standard to the plaintiff's restraint claim.

The "substantial departure from accepted professional judgment" standard that I developed in relation to the protection claim should also apply to the restraint claim. This standard provides for judicial scrutiny yet gives the state leeway in which to accommodate the interests it has in confining the mentally retarded. At first glance, this standard may appear to be inappropriate in the context of a restraint claim. As I noted earlier, however, the state's interests are interrelated, and it is unrealistic to view each of the plaintiff's claims as separate and distinct. Mechanical restraints, when used properly in accord with preestablished procedures, can be an integral part of a treatment program.[5] Furthermore, restraints may

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[5] Pennsylvania law establishes one such procedure by requiring that mechanical restraints be used within an institution only when "the director of a facility or his designee determine that [restraints] are required by the medical needs of [a] person admitted or committed." Pa. Stat. Ann. tit. 50, §4422 (Purdon 1969). Testimony at the trial showed that the plaintiff was restrained only on the order of a licensed physician. The majority, however, appears to assume that the defendants did not comply with §4422 because the physician's order was not supplemented by an order of the director of Pennhurst. *See* majority op. at nn.21 & 25. But it is not clear to me that physicians employed at Pennhurst cannot be the director's "designee" within the meaning of the statute. Moreover, this issue is not raised on appeal and was not briefed by the parties.

be essential to protect the safety of the patients.[6] Whether this is the situation here is, of course, a question for the jury.

I believe that the jury should be instructed that physical restraint related to the provision of care or treatment violates the plaintiff's rights if the defendants' conduct was such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the defendants did not base their conduct on a professional judgment. Restraint for the convenience of the staff or for punishment serving no legitimate purpose would be a substantial departure from accepted professional judgment and thus a violation of the plaintiff's constitutional right to care and treatment. Of course, other prerequisites to establishing the defendants' liability also would have to be met.

C. *Treatment Claim*

The plaintiff's final claim is that the defendants deprived him of his constitutional rights by not making available adequate treatment while he was confined in the Pennhurst hospital building. The plaintiff also appears to be asserting that he has a right to treatment in the least restrictive alternative. My discussion of the least restric-

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[6] Protection may include both protection from self and protection from others. Confinement in a hospital may present special problems because of the presence of medical equipment and supplies and the fragile health of many patients. For example, testimony at the trial indicated that profoundly retarded residents often need to be restrained when confined in the Pennhurst hospital building because other patients are in traction or receiving intravenous fluids. *See* Trial Transcript, vol. 7, at 40-41, 76.

tive alternative standard in the preceding section applies with equal force to the treatment claim. As a result, I agree with the majority's holding that least restrictive alternative analysis is inappropriate when assessing the adequacy of treatment already administered. I do not agree, however, that the standard articulated by the majority is a correct statement of what the Constitution requires, nor do I concur in the majority's promulgation of a three-tier framework for analyzing treatment claims.

The majority holds that when the jury finds that some treatment has been administered, it should determine whether the treatment is regarded as acceptable in light of present medical or other scientific knowledge. This standard is in effect the same standard that would apply in a state malpractice action. As noted previously, it is of vital importance to maintain the distinction between common-law tort actions and constitutional decisions. The "substantial departure from accepted professional judgment" standard preserves this distinction while accommodating the concerns of both the institutionalized mentally retarded and state officials.

The majority also divides treatment claims into three categories and formulates different standards of review for each category. I believe, however, that such distinctions are artificial and will lead to unnecessary complexity and confusion. *See* part II *supra.* The jury should be instructed to apply the "substantial departure from accepted professional judgment" standard to all aspects of the treatment claim. Inaction by the defendants or the use of restrictive procedures in treatment can, of course, be taken into consideration by the jury in determining whether professional judgment has been exercised.

V.

The lamentable conditions that exist at Pennhurst have been detailed elsewhere. *See Halderman*, 612 F.2d 84. The institution is unsanitary and understaffed, and many of its residents are subjected to violence and enforced inactivity. I stand second to no one in condemning these conditions, and, as I emphasized in my dissent in *Halderman*, I believe that the federal judiciary has a duty to ensure that these conditions are eliminated. However, our duty in this case is only to establish minimum constitutional standards to govern the individual claims of a Pennhurst resident against certain Pennhurst officials. I would hold that the Constitution requires the district court to instruct the jury that the defendants' conduct comports with due process if it is not a substantial departure from accepted professional judgment. Because the majority's decision is inconsistent with this standard, I cannot join the opinion of the court.

ALDISERT, *Circuit Judge*, with whom Judge Garth joins, concurring.

Although I join the concurring opinion of Chief Judge Seitz in all respects, I write separately to emphasize the two important differences, one conceptual and one pragmatic, that divide this court.

I.

The concurring judges approach this troublesome problem in the grand tradition of the common law, precisely distinguishing between the elements of a due process deprivation and the elements of the state tort of medical malpractice. Chief Judge Seitz emphasizes with elegance and profound jurisprudential integrity that not all state

law torts amount to due process deprivations. He contends that in the factual complex presented here, a prima facie case of a due process deprivation is established only by proof of "such a substantial departure from accepted professional judgment, practice, or standards . . . as to demonstrate that the defendants did not base their conduct on a professional judgment," or, in other words, that the treatment technique employed was "a sham or otherwise illegitimate." Con. op. of Seitz, C.J., at page 59a.

In the common law tradition, courts resolve disputes by examining the rules laid down by prior decisions. These are rules of law in the narrow sense, "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts,"[1] or "fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct."[2] The common law "creeps from point to point, testing each step"[3] and grows slowly by gradual accretion from the resolution of specific problems. Holmes noted that the great growth of the common law came about incrementally.[4] Courts fashion *principles* from a number of *rules* of decision, in a process characterized by experimentation. Rules of case law are treated not as final truths, "but as working hypotheses, continually rested in those great laboratories of the law, the courts of justice."[5] The common law tradition has

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[1] *Pound, Hierarchy of Sources and Forms in Different Systems of Law,* 7 Tulane L. Rev. 475, 482 (1933).

[2] Hughes, *Rules, Policy and Decision Making,* 77 Yale L. J. 411, 419 (1968).

[3] A. Whitehead, Adventures of Ideas ch. 2, §6 (1967).

[4] Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 468 (1897).

[5] M. Smith, Jurisprudence 21 (1909).

been described as a method "of reaching what instinctively seem the right result in a series of cases, and only later (if at all) enunciating the principle that explains the pattern—a sort of connect-the-dots exercise."[6]

Chief Judge Seitz adheres to this tradition in two respects. First, he sets forth a detailed legal consequence for the detailed set of facts in this case. By contrast, the majority's formulation is cast in terms of *grandi astrazioni*, predicating liability on notions of "substantial necessity," "compelling necessity," and "least intrusive means." These abstractions, dubbed in classroom jargon as constitutional law "buzz words," have the unfortunate capacity to mean all things to all people.

Second, Chief Judge Seitz develops the law incrementally, explaining how a respectable body of state tort law, built on thousands of fact situations resolved by courts over several centuries, is immediately available to the plaintiffs. If the plaintiffs prove egregious conduct constituting gross negligence and demonstrate that the treatment or lack of treatment may be fairly characterized as a sham, the plaintiffs would have available additional relief to cure the constitutional deprivation. Thus, he recognizes that the plaintiffs carry separate arrows in their quiver: state malpractice relief for certain levels of conduct falling below standards of reasonable medical practice, and federal relief under 42 U.S.C. §1983 if the con-

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[6] Ely, *The Supreme Court 1977 Term, Forward: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5, 32 (1978) (citing Amsterdam, *Perspectives of the Fourth Amendment*, 58 Minn. L. Rev. 349, 351-52 (1974)). *See also* Arnold, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298, 1311-12 (1960); Holmes, *Codes and the Arrangement of the Law*, 44 Harv. L. Rev. 725, 725 (1931).

duct is sufficiently egregious to violate the fourteenth amendment.

By approaching the case from the common law perspective, Chief Judge Seitz recognizes a tenet recently articulated by one of America's great law schools, to which I subscribe completely:

> The United States, more than any other country, has been a country of law, laws, and lawyers; nowhere else is so much of the ferment of society expressed in terms of a Constitution. . . . We have come, however, to see that all the great issues of the day are not concentrated on constitutional law . . . but that contemporary problems embrace and are informed by a variety of public law fields, from tax and administrative law to health, labor and penal law. We have come to see, also that the traditional private law subjects—contracts, torts, and property, for instance—are more and more intertwined with considerations of public law and public interest; and further, that much of the traditional learning in these subjects is not revealed truth, but a reflection of values of society at given periods of time.[7]

Rather than creating overriding constitutional precepts that obfuscate the role of tort law in correcting institutional abuses, he relies on the Anglo-American tort law experience for a more principled resolution of this controversy.

Although the majority purport to recognize and preserve the distinction between claims under the constitu-

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[7] Curriculum Committee Report, New York University School of Law, November 30, 1978, *reprinted in* An Introduction to New York University School of Law, Juris Doctor (J.D.) Program 1980-1981 (cover page).

tion and claims under state tort law, their decision actually blurs that distinction. By formulating a standard for constitutional deprivation low enough to be asserted in virtually all malpractice actions arising out of the treatment of the institutionalized retarded, the majority place a substantial burden on lay juries, who must avoid confusing the elements of these related claims. Notwithstanding my high regard for lay jurors, I doubt that medical professionals, much less laymen, can foresee the ramifications of the majority's due process standards.

In addition, by promulgating standards for due process claims that are facially almost indistinguishable from malpractice allegations, the majority have effectively extended federal jurisdiction into all malpractice claims arising in state institutions. Although diversity is currently required to litigate state tort claims in the federal courts, future plantiffs will be able to assert, undoubtedly in good faith, that the state treatment had no "coherent relationship" to their needs, that they were restrained without "compelling necessity," or that they were left unprotected without "substantial necessity." These plaintiffs will be able to assert federal jurisdiction under 28 U.S.C. §1343 (3), and append their claim of malpractice. I do not doubt that the federal courts of this circuit will soon be repositories for all personal injury claims arising in state institutions for the mentally retarded. Indeed, that appears to be the majority's intent, for they advance the rather peculiar notion that these situations in which a person has been committed to a state institution by a state process, subject to state control through state employees, present issues not primarily of state concern, but "fundamental issues of national import." Maj. op. at page 40a This expansion of jurisdiction deserves greater consideration than just one case.

II.

The majority's abandonment of incremental decision-making in favor of promulgation of broad standards is not only methodologically offensive, but lacks utility for the groups most affected by this decision. As the preceding concurring opinion notes, the complexity and confusion of the majority's formulation "will affect both the ability of a jury to meaningfully assess liability and the ability of state officials like the defendants to effectively conform their conduct to these standards." Con. op. of Seitz, C.J., at page 51a. But the confusion will not start at the door of the jury room. In making decisions on motions for summary judgment or directed verdict, the district judges will be grasping at ropes of sand when they attempt to perceive the current wisdom of "substantial necessity" in one category of behavior or "compelling necessity" in another. And to predict what a given panel of this court will do on review would be akin to interpreting the speech of Pythia after she chewed the laurel leaves at Delphi.

But many persons besides juries, judges, and legal philosophers must participate in this divining process. There are staff physicians and, more important, staff attendants. Staff attendants, even more than physicians, are responsible for the hour-by-hour operation of state mental institutions, and their activity has now become strictly regulated by amorphous constitutional law tenets. We can assume that these attendants have neither the intellectual acumen nor the constitutional law insight possessed by Anthony Amsterdam, Gerald Gunther, Archibald Cox, or Laurence Tribe. Yet the majority formulation now requires them to apply these new constitutional precepts in deciding, for example, whether to employ "soft restraints," metal shackles, or a leather muff to control a disruptive

patient. *See* con op. of Seitz, C.J., at page 60a, n.3. As a result, staff attendants as well as staff physicians will be compelled to seek legal counsel. Their attorneys will then prophesy "what the courts will do in fact. . . ."[8] The lawyers, even specialists in medical malpractice, public or hospital administration, or casualty insurance underwriting, will be hard pressed to formulate guidelines.

One obvious situation in which guidelines will be difficult to formulate comes to mind. The plaintiff here complained of seventy separate injuries. We can assume that some were self-inflicted; some were inflicted by fellow patients, retaliating from the plaintiff's aggressive behavior. The majority formulation makes it a violation of the United States Constitution to shackle one patient improperly, and a separate violation if an unrestrained patient attacks another patient. In the real world environment of a hospital ward the staff attendant must decide which constitutional right deserves protection. The decision must be made amid the cry and tumult of a mental hospital, not in the cloister of the Third Circuit law library, nor in the conference room of nine circuit judges who are divided five to four on a difficult problem.

It took centuries for the common law to move from thirteenth century notions of criminal trespass to the landmark decisions establishing trespass on the case, now modern day negligence.[9] It took the French from July, 1790, to March, 1804, to formulate the French Civil Code,[10]

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[8] Holmes, *supra* note 4 at 461.

[9] *See* W. Prosser, Handbook of the Law of Torts ch. 2, §7 (4th ed. 1971).

[10] *See* A. von Mehren & J. Gordley, The Civil Law System 48-51 (2d ed. 1977).

and the Germans from 1873 to 1896 to fashion the *Burgerliches Gesetzbuch (BGB)*.[11] More recently, it took fifteen years of incremental development to produce strict liability for defective products.[12] Attorneys attempting to advise clients by predicting the effect of today's decision on specific fact patterns will be deprived of the body of law leading to the broad standards promulgated by the majority. Their ability to predict will suffer, and the persons most affected will be those who seek legal advice.

The majority's purpose is admirable. They recognize that the disposition of this case will presage an expansion of litigation involving the constitutional rights of the institutionalized mentally ill. In an attempt to aid the lower courts in dealing with the anticipated cases, the majority formulate general standards for evaluating these claims. But their approach does not accord with the common law adjudicatory tradition of proceeding gradually and empirically. The direction and instructions presented are thus founded not on experience, but on speculation. It is not surprising that this attempt to achieve predictability in disregard of the common law tradition achieves just the opposite result. All persons who must rely on these standards—institutional staffs, physicians, their attorneys, district judges, and subsequent panels of this court—will

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[11] *See id.* at 73-77.

[12] This development is generally measured from Roger J. Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 457, 150 P.2d 436, 440 (1947) (Traynor, J., concurring), to his majority opinion for the court in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 687 (1962).

struggle to determine the context in which the claim arose,[13] and then to apply the appropriate standard for that context. The resulting confusion will undermine the majority's attempt to formulate universal precepts on a limited record. I predict that this court's current inexperience in this area will become increasingly apparent in subsequent cases.

The majority have failed to recognize that every new case is an experiment, and that if the accepted rule that seems applicable yields a result felt to be unjust, under the common law tradition, the rule is reconsidered. "[I]f a rule continues to work injustice, it will eventually be reformulated."[14] As Chief Judge Seitz explains, however, "[a] statute is relatively easy to change but the Constitution is not." Con. op. of Seitz, C.J., at page 58a.

It has been almost twenty years since I faced a client across a law office desk. But were I to be placed in that position today, my advice would probably go like this: if you are contemplating a position as an attendant in a mental hospital, seek another job; there is simply too much unpredictability in the law governing your conduct. If you are a physician, make certain that the state's malpractice insurance policy includes a clause protecting you from the new "constitutional torts" manufactured today

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[13] The three contexts are physical restraints, which must be justified by "compelling necessity," maj. op. at page 18a, protection from physical attacks, the absence of which must be justified by "substantial necessity," maj. op. at page 25a, and adequacy of treatment, which must be justified by "a coherent relationship between a particular treatment program and a resident's needs," maj. op. at page 38a-39a.

[14] M. Smith, note 5 *supra*, at 21.

by the Third Circuit Court of Appeals. If you are an insurance carrier, set your premiums high, anticipating fully and completely the open-ended notions of "substantial" and "compelling" necessity and "least intrusive treatment." If you are a governor or state legislator, cut back and retrench institutional programs for the mentally retarded, because the potential for lawsuits has now increased geometrically, with corresponding demands on the tax base to support the costs. If you are a parent with a retarded child, I simply feel sorry for you. The sincere effort to provide financial relief for personal injuries suffered by retarded persons has been accomplished at an enormous social cost. In striking the balance between how seriously the complainants are being hurt and how much it will cost to afford them more relief than is presently available under state tort law, the balance has been struck so vaguely that state institutional programs, already diminishing, will be curtailed further. Given the recent political currents, there simply are not, and will not be, sufficient tax dollars, state or federal, to give the defendants adequate financial protection to meet the illusory standards promulgated today.

GARTH, *Circuit Judge,* with whom Judge Aldisert joins, concurring.

I join in Chief Judge Seitz's concurring opinion. I write separately, however, to express my views with respect to a troubling feature of the majority opinion. As Chief Judge Seitz has recognized in note 1 of his concuring opinion, this case does not present claims involving nonreversible surgery or the administration of antipsychotic drugs. The majority concedes as much. Nonetheless the majority includes both of these procedures in its

discussion (Maj. Op. pages 29a-31a). That discussion is then apparently related to the jury charge which appears as III C in the Appendix (Maj. Op. page 47a), requiring as a constitutional measure the application of a "least intrusive treatment" standard where "significant deprivations of liberty" occur.

The problem with including this discussion and this charge in this case is apparent. It is crystal clear that the Plaintiff here had neither alleged nor suffered from non-reversible surgery. Nor did he allege or suffer from being medicated with a powerful anti-psychotic drug. Thus, the entire discussion in the majority opinion which refers to these two conditions is gratuitous and constitutes no more than dictum. Moreover, while it may be contended that this discussion of surgery and drugs was only to illustrate the thesis that various standards are needed to accommodate different levels of medical treatment, by referring to procedures outside the *Romeo* record and crafting jury instructions which govern these procedures, the majority has trenched directly upon a case which does concern the administration of anti-psychotic drugs and which is pending before this Court. That case, *Rennie v. Klein*, Nos. 79-2576 and 79-2577, was argued before this Court on April 22, 1980. The filing of the panel's decision has been withheld by a majority vote of the full Court, pending the filing of the present *en banc* opinion.

Rennie deals with the issue of the involuntary administration of anti-psychotic drugs to mentally *ill* patients (as distinguished from mentally *retarded* patients, the focus of the *Romeo* case). In *Rennie*, the trial of this issue produced an extensive record which centered wholly on the administration of anti-psychotic drugs. That record, and the issues arising from it, were fully briefed and argued

by the parties in *Rennie* before a panel of this Court. The decision in *Rennie* will therefore meet head-on the very issue of the requisite constitutional standards involved in the administration of anti-psychotic drugs which the *Romeo* majority by its equivocal discussion and purported adoption of a "least intrusive" standard seeks to influence, if not to establish, here. This has been sought to be accomplished notwithstanding the absence of an appropriate record in *Romeo* and without the benefit of analysis, argument, or briefing of the anti-psychotic drug issue by the parties in *Romeo.*

Thus, the multi-level series of standards adopted by the majority has now additionally resulted in bald dictum which purports to promulgate a legal standard involving the administration of anti-psychotic drugs—a standard that is wholly inappropriate for resolution in this case and one that may very well be rejected or modified by the holding of this Court in *Rennie v. Klein, supra,* the case which presents that very issue.

A True Copy:

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Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO

v.

DUANE YOUNGBERG, RICHARD MATTHEWS and MARGUERITE CONLEY

MEMORANDUM

MC GLYNN, J.

Plaintiff Nicholas Romeo brings this action by his next friend and mother against the superintendent and other officials of Pennhurst Center, formerly Pennhurst State School and Hospital, wherein plaintiff resides. He alleges that defendants have failed to protect him from repeated beatings and similar physical abuse inflicted at the hands of other patients of the facility. Plaintiff asserts that this failure to provide adequate protection results in his confinement under conditions which constitute cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments and in violation of the Civil Rights Act of 1871, 42 U.S.C. §1983. Jurisdiction is invoked pursuant to 28 U.S.C. §§1331 and 1343 (3) and (4). Plaintiff seeks declaratory and injunctive relief to remedy the conditions of his confinement, and presents a claim for damages to compensate for previous injuries, some of which are alleged to be of a permanent nature. The complaint

also seeks to have defendants pay the costs of Mr. Romeo's care and treatment at any facility to which he may be transferred.

Nicholas Romeo is a twenty-eight year old severely retarded man whose mental development allegedly approximates that of a child of eighteen months. He is confined at Pennhurst for an indefinite period under an order of involuntary civil commitment entered by the Honorable Ned L. Hirsh on 11 June 1974. The complaint alleges that from July, 1974 to the present, plaintiff suffered a variety of injuries as a result of at least sixty-three attacks or beatings by unnamed third persons at Pennhurst. Defendants are alleged to have had personal knowledge of these attacks, but nevertheless failed to adopt protective measures despite a duty to provide plaintiff with reasonable care, all in violation of plaintiff's constitutional rights.

Currently before the Court is defendants' motion to dismiss, which asserts that the complaint fails to state a cause of action upon which relief can be granted, that this Court lacks subject-matter jurisdiction because plaintiff failed to seek habeas corpus relief in the Pennsylvania courts, and that the Eleventh Amendment bars any recovery against defendants in their official capacities.

Defendants' Fed. R. Civ. P. Rule 12(b) (6) motion to dismiss for failure to state a cause of action will be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80, 84 (1957). In making this determination, the allegations in plaintiff's complaint must be accepted as true. *Gardner v. Toilet Goods Association*, 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704

(1967). In the instant case, it does not appear that plaintiff can prove no set of facts sufficient to entitle him to relief. On the contrary, if the allegations of the amended complaint are proved, a cause of action under 42 U.S.C. §1983 will have been set forth. See *Parker v. McKeithen,* 488 F.2d 553 (5th Cir. 1974); *Roberts v. Williams,* 456 F.2d 819 (5th Cir. 1971), *cert. denied,* 92 S. Ct. 83 (1971); *New York State Association for Retarded Children, Inc. v. Rockefeller,* 357 F. Supp. 752 (E.D. N.Y. 1973). As plaintiff observes, confinement in a prison where violence and terror reign is actionable under the Eighth Amendment. *Woodhous v. Commonwealth of Virginia,* 487 F.2d 889 (4th Cir. 1973). Since persons civilly committed to state institutions are not criminals, they are entitled to conditions which are at least the same as those existing in prisons, and in some cases, conditions tolerated in the latter are impermissible in other state institutions. *New York State Association for Retarded Children, Inc. v. Rockefeller, supra.*

Defendants argue that only the Department of Public Welfare has the power and authority to cause plaintiff's transfer to another facility, and cite in support of this contention §416 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4416. If this be the case, the appropriate resolution is to permit plaintiff to join the Secretary of the Department of Public Welfare as an indispensible third party rather than to dismiss the action. 3A Moore, Federal Practice, 19.19 at 2583.

However, while joinder of the Secretary of the Department of Public Welfare may well be desirable, it does not appear necessary to afford the relief sought by plaintiff should he prevail on the merits. The above-cited section of the Act provides in pertinent part:

> "(a) The department *may, upon application by the director of any state operated facility,* transfer a mentally disabled person to any other state operated facility under its jurisdiction. . . ." 50 P.S. §4416 (a) (Emphasis supplied).

Although plaintiff does not specifically ask that defendant Youngberg be ordered to seek such a transfer from the Department, his prayer for "other just and equitable relief" may be deemed to encompass such a request. In any event, plaintiff has indicated to the Court that a transfer to another institution would not be required if he could be placed in a safer ward within Pennhurst. Certainly defendants do not deny that they are empowered to effect such a transfer within their own institution.

Therefore, accepting plaintiffs allegations as true as I must, it is clear that the complaint states a cause of action sufficient to withstand defendants' Rule 12(b)(6) motion. *See Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976).

Defendants next argue that this Court lacks subject-matter jurisdiction to order Mr. Romeo's release and transfer because plaintiff has failed to exhaust his available state habeas corpus remedy, citing the exhaustion requirement of 28 U.S.C. §2254. While plaintiff clearly does have a state habeas corpus remedy available to him under 50 P.S. §4426, I am not persuaded that he must pursue such remedy under the circumstances of this case.

By its terms, 28 U.S.C. §2254 applies to habeas corpus actions in the federal courts by state prisoners. Since the instant case is one under 42 U.S.C. §1983 rather than the federal habeas statute, the exhaustion requirement of §2254 (b) is not directly applicable. Defendants, however, urge that plaintiff is challenging the fact or length

of his confinement, that the sole federal remedy is a habeas corpus action, and therefore, the exhaustion requirement of §2254 (b) does in fact apply. Plaintiff replies that he merely seeks to alter the location of his confinement.

Both parties cite *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) in support of their respective positions on this issue. *Preiser* held that a §1983 action is an appropriate remedy for a prisoner who challenges on constitutional grounds the conditions of his incarceration, but not the fact or duration thereof. Here, plaintiff seeks a transfer to safer facilities where he will not be subjected to attacks by other patients, either within Pennhurst itself or to another state institution. He does not challenge the fact of his committment by Judge Hirsh, nor does he seek an unconditional release from Pennhurst without a transfer. Unlike *Preiser*, the relief sought in the case at bar would not affect the time at which Mr. Romeo is ultimately released. The mere fact that a transfer to another facility may necessitate a release from Pennhurst is not sufficient to constitute a challenge to the fact or length of plaintiff's confinement so as to preclude the instant §1983 action. The relief requested would only affect the location of confinement and would not effect an unconditional release.

An action under §1983 is therefore appropriate to the facts of this case. *Preiser v. Rodriguez, supra.* Plaintiff need not first seek redress in the state courts, with respect to his claim for damages or for equitable relief. *Preiser v. Rodriguez, supra; Clutchette v. Procunier*, 497 F.2d 809 (9th Cir. 1974).

Finally, defendants argue that the Eleventh Amendment bars any recovery from them in their official capac-

ities. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). I agree. However, there is no dispute that the claim for damages against defendants individually is not barred. And to the extent that Mr. Romeo seeks *prospective* injunctive relief to cure any unconstitutional conditions that may be found to exist at Pennhurst, which relief would require the incidental expenditure of state funds, the effect on the state treasury is merely ancillary and is not barred by the Eleventh Amendment. *Edelman v. Jordan, supra.*

For the reasons set forth above, I will grant defendants' motion to dismiss to the extent that plaintiff seeks damages from them in their official capacities. In all other respects, defendants' motion to dismiss will be denied.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO

v.

DUANE YOUNGBERG, RICHARD MATTHEWS and MARGUERITE CONLEY

ORDER

AND NOW, this 6th day of June, 1977, it is hereby ORDERED that defendants' motion to dismiss be and the same is hereby GRANTED to the extent that plaintiff seeks damages from them in their official capacities.

IT IS FURTHER ORDERED that defendants' motion to dismiss, in all other respects, be and the same is hereby DENIED.

By the Court:
Joseph L. McGlynn, Jr., J.
Joseph L. McGlynn, Jr., J.

Entered: June 8, 1977
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Number 76-3429

NICHOLAS ROMEO, an incompetent, by his mother and next friend, PAULA ROMEO,

Plaintiff

v.

DUANE YOUNGBERG, individually and in his official capacity as Superintendent, Pennhurst State School and Hospital,

and

RICHARD MATTHEWS, individually and in his official capacity as Director of Resident Life, Pennhurst State School and Hospital,

and

MARGUERITE CONLEY, individually and in her official capacity as Unit Director, Unit 9, Pennhurst State School and Hospital.

Jury Trial Demanded

SECOND AMENDED COMPLAINT

1. Jurisdiction is conferred on this Court by 28 U.S.C. §§1343(3) and (4), this being an action brought under the Civil Rights Act of 1866, 42 U.S.C. §1983. Jurisdiction is additionally conferred by 28 U.S.C. §1331,

this being an action arising under the Constitution and laws of the United States, the amount in controversy exceeding ten thousand dollars ($10,000).

2. Injunctive and declaratory relief is authorized by 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

3. Plaintiff NICHOLAS ROMEO is a citizen of the United States presently residing at Pennhurst State School and Hospital, Spring City, Pennsylvania. As an incompetent adult, he brings this action by his next friend and mother, PAULA ROMEO, who is a citizen of the United States and resides at 1136 McKean Street, Philadelphia, Pennsylvania.

4. Defendant DUANE YOUNGBERG is the Superintendent of the Pennhurst State School and Hospital located at Spring City, Pennsylvania (hereinafter referred to as PENNHURST). As Superintendent of Pennhurst, Dr. YOUNGBERG has overall supervisory authority over the operations of that facility.

5. Defendant RICHARD MATTHEWS is the Director of Resident Life at Pennhurst. As Director of Resident Life, he has day-to-day responsibility for the health and welfare of persons incarcerated in that facility.

6. Defendant MARGUERITE CONLEY is the Unit Director for the unit at Pennhurst in which plaintiff is incarcerated. In this capacity, she has responsibility to provide for the health and welfare of persons confined in that unit at Pennhurst.

7. Plaintiff is a twenty-eight year old profoundly retarded individual who suffers from a brain disorder such that his mental development approximates that of an eighteen month old child.

8. On June 11, 1974, plaintiff was involuntarily committed to Pennhurst for an indefinite period by the Honorable Ned L. Hirsh pursuant to the provisions of Section 406 of the Mental Health and Mental Retardation Act of 1966.

9. During the period July 1974 to the present, plaintiff has suffered injuries on at least sixty-three occasions. These injuries include: a permanently deformed finger; broken bones; injuries to his sexual organs; hepatitis; lacerations; scratches; black eyes; boils; and human bites.

10. These injuries were sustained by plaintiff as a result of attacks on him by third persons while he was incarcerated at Pennhurst.

11. The repeated attacks and beatings have led to plaintiff's hospitalization on several occasions, and have caused him intense pain and suffering.

12. All defendants had personal knowledge of these repeated attacks and beatings, but have failed to adopt such policies and procedures which would protec plaintiff from such attacks.

13. Defendants' refusal to provide plaintiff such care and attention as is required to prevent him from incurring repeated attacks and beatings constitutes an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments to the United States Constitution.

14. At all times relevant hereto, all defendants acted in a manner which they knew or should have known was violative of plaintiff's constitutional rights, or in conscious disregard thereof.

15. The unconstitutional deprivation of plaintiff's rights by defendants have subjected him to repeated physical attacks and beatings, mental anguish, humiliation and suffering of the highest degree.

16. Defendants have failed to institute such policies and procedures as are required to assure plaintiff a reasonable degree of physical safety.

17. Defendants, by failing to adopt such procedures to prevent plaintiff from incurring repeated attacks and beatings have breached their duty to provide plaintiff reasonable care.

18. Defendants' breach of duty to plaintiff has subjected him to repeated attacks and beatings, mental anguish, humiliation, and suffering of the highest degree.

19. As a result of the aforementioned conduct by defendants, plaintiff continues to suffer irreparable harm: to wit, continued beatings and assaults endangering his life and limb.

20. Subsequent to the filing of plaintiff's complaint in the instant matter, defendants have caused plaintiff to be transferred to the Medical-Surgical Hospital Building at Pennhurst. ("Pennhurst Hospital")

21. While in the Pennhurst Hospital, plaintiff has received no treatment for his mental retardation whatsoever, nor has he participated in any training or recreation programs.

22. While in the Pennhurst Hospital, defendants and their agents, have caused plaintiff to be shackled to his bed or otherwise physically restrained for long periods of time each day.

23. As a direct result of defendants' refusal to provide plaintiff treatment or programs, and as a direct result of defendants' actions in shackling plaintiff to his bed, or otherwise restraining him, plaintiff suffers and continues to suffer extreme physical pain, mental anxiety and suffering.

24. Defendants have intentionally and maliciously taken the above-described actions in order to punish plaintiff for filing the instant action and in order to compel plaintiff to withdraw it.

25. Defendants' transfer of plaintiff to the Pennhurst Hospital, shackling him to his bed and otherwise physically restraining him and refusing to provide him treatment or programs for his mental retardation, constitutes an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments to the United States Constitution.

26. Other State Facilities, such as the Woodhaven Center, exist which have vacancies and which could provide NICHOLAS ROMEO with treatment and programs for his mental retardation, without the constant use of shackles and other physical restraints such as those presently used upon plaintiff.

27. Defendants have refused to seek plaintiff's transfer to such facilities, despite Ms. PAULA ROMEO'S repeated requests that they do so.

28. Defendants have refused to seek plaintiff's transfer to such facilities, despite recommendation and requests of Pennhurst employees and other mental retardation professionals that defendants do so.

29. Defendants' refusal to seek plaintiff's transfer to a mental retardation facility which could provide plaintiff appropriate treatment and programs without the constant use of shackles and other forms of physical restraints, constitutes an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments to the United States Constitution.

30. Defendants' unconstitutional deprivation of plaintiff's rights to such a transfer has caused plaintiff intense physical pain, mental anguish, humiliation and suffering of the highest degree.

31. Defendants have intentionally and maliciously refused to seek such a transfer in order to punish plaintiff for filing the instant action, and to coerce him to withdraw it.

WHEREFORE, plaintiff prays that this Court:

1. Take jurisdiction over this claim;

2. Grant declaratory relief holding defendants' failure to provide for the physical safety of plaintiff and refusal to provide him treatment in the least restrictive alternative to be violative of the civil rights of plaintiff;

3. Grant injunctive relief requiring that defendants place plaintiff in the custody of a mental retardation facility which will provide plaintiff a reasonable degree of physical safety, and treatment in the least restrictive alternative, requiring that defendants pay the costs of his care and treatment at any such facility;

4. Grant injunctive relief requiring defendants to cease refusing to provide plaintiff with treatment and programs for his mental retardation and to cease shackling plaintiff to his bed and using other means of physical restraint upon him for long periods each day;

5. Award plaintiff compensatory damages in the amount of one million dollars ($1,000,000) and punitive damages in the amount of two hundred thousand dollars ($200,000);

6. Award his attorney's fees; and

7. Grant such other relief as this Court deems just and equitable.

(s) Edmond A. Tiryak
Edmond A. Tiryak
Elliot B. Platt
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PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

* * * * * * * *

8. Plaintiff Nicholas Romeo asserts that his constitutional rights were violated by defendants in four ways. He first contends that defendants' failure to provide him with a reasonable degree of protection from repeated assaults by patients and staff at Pennhurst violates his rights under the Eighth Amendment to the United States Constitution.

9. The Eighth Amendment forbids the infliction of cruel and unusual punishment upon persons confined to state mental institutions. Thus, if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo, such failure to act deprived plaintiff of rights guaranteed by the Eighth Amendment.

Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974); *Halderman v. Pennhurst*, Civ. A. No. 74-1345 (E.D. Pa. Dec. 23, 1977); *Welsh v. Likins*, 373 F. Supp. 487, 502-3 (D. Minn. 1974), *aff'd in part, and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Ass'n for Retarded Children, Inc., v. Rockefeller*, 357 F. Supp. 752, 764 (E.D. N.Y. 1973).

Note also that this statement is the "law of the case." See *Romeo v. Youngberg*, Civ. A. No. 76-3429 (June 6, 1977).

10. Plaintiff Nicholas Romeo also contends that this Eighth Amendment right to be free from cruel and unusual punishment was violated after this lawsuit was filed by the

defendants unnecessarily shackling him to his bed or chair and denying him the opportunity to participate in the same treatment and programs as other residents at Pennhurst. Plaintiff contends that defendants shackled him and denied him programs to punish him for filing this lawsuit.

If you find that any or all defendants shackled or caused Nicholas Romeo to be shackled to his bed or chair, or denied him programs as a punishment for filing this lawsuit, those acts deprived plaintiff of rights guaranteed by the Eighth Amendment.

11. Plaintiff also contends that his rights under the Fourteenth Amendment to the United States Constitution were violated by defendants. The Fourteenth Amendment to the Constitution provides in relevant part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

12. Under the Fourteenth and Eighth Amendments, state officials at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff. Plaintiff Nicholas Romeo contends that these defendants violated such a duty to protect him, because they were aware of such attacks, and failed to take such reasonable steps as required to protect him.

13. Under the Eighth and Fourteenth Amendments, state officials at a state mental hospital have a duty to provide residents of such institutions with such treatment as will afford them a reasonable opportunity to acquire and

maintain those life skills necessary to cope as effectively as their capacities permit. If you find that defendants failed to provide plaintiff with such treatment, then you must find that plaintiff's Eighth and Fourteenth Amendment rights were violated.

See, e.g. Welsch v. Likens, 550 F.2d 1122, 1132 (8th Cir. 1977); *Nelson v. Heyne,* 491 F.2d 352, 360 (7th Cir. 1974) *cert. denied* 417 U.S. 967 (1974). *See also Scott v. Plante,* 532 F.2d 939, 947 (3d Cir. 1976).

14. Once admitted to a state mental facility, residents such as the plaintiff in this case also have a constitutional right to treatment under the least restrictive conditions consistent with the purpose of the commitment.

Plaintiff contends that he was shackled to his bed or chair for long periods of time each day after he filed this lawsuit. If you find that he could have been provided treatment under less restrictive conditions than those imposed upon him, then you must find that his constitutional rights were violated.

See Halderman v. Pennhurst, supra; Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977) (per Lord, Ch. J.); *J. L. v. Parham,* 412 F. Supp. 112, 139 (M.D. Ga. 1976) (three-judge court), *appeal pending* U.S. , 97 S.Ct. 2647 (1977); *Gary W. v. Louisiana,* No. 74-2412 (E.D. La., filed July 26, 1976), *modified,* October 28, 1976; *Woe v. Mathews,* 403 F. Supp. 419, 428 (E.D. N.Y. 1976), *remanded in part dismissed in part sub nom. Woe v. Weinberger,* 556 F.2d 563 (2d Cir. 1977); *Suzuki v. Quisenberry,* 411 F. Supp. 1113, 1132-33 (D. Hawaii 1976); *Lynch v. Baxley,* 386 F. Supp. 378, 392, (M.D. Ala. 1974); *Davis v. Watkins,* 384 F. Supp. 1196, 1206 (N.D. Ohio 1974); *Saville v. Treadway,* 404 F. Supp. 430 (M.D.

Ala. 1974); *Welsch v. Likens*, 373 F. Supp. 487, 502 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *Morales v. Turman*, 383 F. Supp. 53, 124 (E.D. Tex. 1974), *rev'd and remanded on other grounds*, 535 F.2d 864 (5th Cir. 1976) *judgment of Court of Appeals rev'd and remanded*, U.S. , 97 S.Ct. 1189 (1977); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1096 (E.D. Wisc. 1972) (three-judge court), *vacated and remanded on other grounds*, 414 U.S. 473 (1974); *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 969, 973-4 (M.D. Pa. 1971) (Consent Decree).

15. To find for plaintiff, you need not find that defendants personally participated in any attack upon plaintiff. If you find that defendants were aware of repeated attacks upon plaintiff, and failed within their sphere of authority to take reasonable steps to protect plaintiff, then you must find that defendants are liable for a violation of plaintiff's constitutional rights.

Sims v. Adams, 537 F.2d 829 (5th Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Holland v. Connors*, 491 F.2d 539 (5th Cir. 1974) (per curiam); *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972) *cert. denied* 409 U.S. 885 (1976); *Byrd v. Briske*, 466 F.2d 6 (7th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *reversed on other grounds* 409 U.S. 418 (1973); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971) *cert denied* 404 U.S. 866 (1971).

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

(6-3) (Now, 9:30 a.m., Monday, April 24, 1978, trial resumes in the presence of the jury.)

MR. TIRYAK: I call Dr. Richard Fox.

MR. McGUIRE: We would ask for an offer of proof.

* * * * * * * *

THE COURT: All right.

What is the doctor's name?

MR. TIRYAK: Richard Fox, Your Honor.

(6-4) THE COURT: What is he going to testify to?

MR. TIRYAK: Your Honor, for purposes of the offer of proof, I will not go into his qualifications.

THE COURT: All right.

MR. TIRYAK: Dr. Fox is going to testify that he has examined Nicholas Romeo at Pennhurst.

Incidentally, Dr. Fox is a psychologist. His specialty is on the behavior and programming of mentally retarded individuals.

He is going to testify he has examined Nicholas Romeo.

He has visited Ward 52 at Pennhurst.

He has reviewed all programming records at Pennhurst with respect to Nicholas Romeo and all accident reports both in a situation where Nicky was the cause of the injury and where he was injured.

He has also reviewed the Pennhurst policies with respect to programming, the DAPT Manual, which I think has been referred to previously, and the Pennhurst Modification Policy.

He is going to offer his professional opinion that the injuries Nicholas Romeo received on Ward 52 was a direct result of the lack of programming on that ward, (6-5) both programming for the aggression of mentally retarded individuals there and for self-help skills.

He is also going to testify that the aggression on that ward, both by Nicholas Romeo and the other residents, was as a result of a lack of activities that the residents there had.

He is going to testify why there is that correlation, that is, the lack of programming and activities of mentally retarded people in a ward such as Ward 52 at Pennhurst would cause a situation to arise where the individuals there learned aggressive behavior since the only attention they would receive on such a ward would be when staff intervened seeing an act of violence taking place.

He is also going to testify there are numerous scientific programs available to reduce the aggressive behavior of mentally retarded people, many of which, several of which Dr. Fox has invented himself or has resolved.

He is going to testify as to the various types of programs that are available.

He is also going to testify these programs are available at Pennhurst itself. They are written up in the DAPT Manual, and he reviewed that DAPT Manual in Ward 52 at Pennhurst.

(6-6) He will further testify that it is ethically required—let me start again.

Dr. Fox will further testify that in choosing among the various techniques to reduce aggression a psychologist is ethically required to first adopt the least restrictive means possible to achieve the result which is reduction of aggression.

He will testify what that means is that in a situation where there are a number of programs available to reduce aggression, the psychologist is first required to choose that method that does not use restraints and that there is no dispute in the scientific literature with respect to that conclusion.

He will testify that only one program of the ones that are available to reduce aggression was ever attempted to be applied to Nicholas Romeo, that program being the differential reinforcement of other behaviors.

He will testify that in reviewing the records on that particular program that the persons who applied the program to Nicholas Romeo did not follow professional standards in conducting the program, that the program was not evaluated scientifically or, in fact, that the program was not done even according to the standards in the DAPT Manual at Pennhurst itself.

(6-7) He is also going to review the muff program which there has been some testimony about. That was the one, Your Honor, that Mrs. Romeo declined to sign her consent to.

He is going to testify there was a violation of professional ethics in choosing that, in offering that program at all since it did not comport with the ethical principle of following the least restriction model.

He is also going to testify that since the least restrictive model itself was incorporated in the Pennhurst be-

havior modification policy, then the suggestion of using that muff program on Nicholas Romeo in itself violated Pennhurst's own policy.

Finally, he is going to testify that that program if applied to Nicholas Romeo would not have worked in his professional opinion since scientific principles were not properly specified in respect to the positive reinforcement which can be applied, that is, the rewards which would have been offered to Nicholas Romeo if he did not engage in aggressive behavior.

Similarly, he will testify that the lack of the programs on Ward 52 to increase self-help skills—these are the toilet training, dressing and the like skills—also played a role in the injuries that Nicholas Romeo (6-8) received because there is an interrelationship between those programs, the occupation of the time of the residents on Ward 52 and aggression.

He will testify that when mentally retarded individuals learn alternative behavior, such as toilet training and dressing and so forth, the aggression decreases.

He is also going to testify that programs, properly conducted programs for such self-help skills are available at Pennhurst again, as specified in the DAPT Manual which is available on Ward 52.

He is then going to review several self-help skills programs which the defendants have described and which this document here, which is D-10. In all occasions he is going to testify that scientific principles were violated in one manner or another in the way the programs were implemented.

As a result of doing all of these programs his testimony will be Nicholas Romeo's self-help skills deteriorated over the time period that he was at Pennhurst.

Finally, he is going to testify with respect to the use of visible restraints upon Nicholas Romeo at Pennhurst. He will testify, he, himself, has used physical restraints on mentally retarded individuals and describe (6-9) the circumstances under which such restraints are required.

He will testify that he has reviewed the restraint records at Pennhurst and evaluated Nicky and his opinion is that the use of restraints presently applied on him in the hospital is not in any way even designed to reduce his aggressive behavior. Rather, the restraints are used for the convenience of staff.

He will testify he, meaning Nicholas, is almost totally in restraints and that the result of applying restraints like that on Nicholas Romeo is, again, a deterioration in his self-help skills and an increase in his aggressive behavior when he is out of restraints.

He will also testify as to the psychological damage the use of restraints has done on Nicholas Romeo.

Your Honor, I think, if Your Honor please, would Your Honor like to see a copy of Dr. Fox's curriculum vitae at this point?

* * * * * * * *

(6-16) THE COURT: Yes. The Supreme Court said you can't turn a malpractice case into a civil rights case and so does the Third Circuit.

It seems to me that is the thrust of the testimony you are offering now.

So I will sustain the objection at this time. If you want to offer other evidence which would suggest the testimony might be appropriate, you can re-offer it at that time.

* * * * * * * *

(6-107) MR. PLATT: It is a physician by the name of Warren Grover. He has been deposed, by the way.

Without going through all of his background, he is an expert in pediatrics neurological pediatrics and he is the Medical Director of the Bancroft School in New Jersey, which is a private institution for the mentally retarded.

He will testify that he examined Nicholas Romeo, gave him a neurological examination, observed his gait, his arm use, his facial and eye movements and his (6-108) repetitive spontaneous movements.

He will testify that his diagnosis as to Nicky's retardation, his brain disfunction as a result of PKU—

THE COURT: What is that?

MR. PLATT: It is a chemical term we have heard a little bit before, I think, here.

It is either an abnormal chemical reaction or an enzyme which affects the brain cells. It is apparently irreversible, and he would just explain that a little bit.

I can't very well, frankly.

He will testify that when he examined Nicky, which was in February of 1978, he found that his right arm bent outwards, the one that was broken, and had incomplete extension.

The fifth finger on the left hand, the one that was broken, he found to be in a flexed fixed position that cannot be straightened.

I believe he will testify it is his opinion that the type of hepatitis Nicky suffered from is infectious and is caused by dirty syringes or contact with fecal matter and, if it was caused by fecal matter, it is his opinion that is the result of improper cleanliness.

Q. As to the cellulitis that Nicky suffered from, he will (6-109) testify that that is an infection that comes after an abrasion. It can and should be prevented with cleansing and protection from abuse, and that it should always be prevented.

He will testify that his impression of Nicholas Romeo's potential for skill development is that he could learn to feed himself, do some toilet training and dress himself, although that would take proper programming.

He doesn't know what the programming is, but he would respond to programming.

He has reviewed records from before Nicholas' commitment to Pennhurst. He has spoken with Mrs. Romeo and he has reviewed Pennhurst records and his own observations and he will testify that as a result of that, his opinion is that Nicholas has regressed in terms of his skills.

As to the frequency and type of injuries sustained by Nicholas, he will testify they are excessive and potentially mutilating, partly on the basis of the results of permanent injury, which is the nasal fracture and the fractures to the arms and the finger.

He has an opinion regarding the continuation at Pennhurst of Nicholas with the same programs and treatments and in his opinion he is not optimistic.

(6-110) To summarize the condition, he will testify Nicky has a history of slow development and seizures and is severely limited with an I.Q. of about 8 to 10, that at home his parents apparently had a program that was sufficiently successful to maintain him.

At Pennhurst the records and the mutilations show that programming is inappropriate and the results of that

inappropriate programming is abnormal behavior that makes his care difficult and he has also suffered from the bony lesions, and that Nicholas could develop skills.

He would testify at the Bancroft School there are residents like Nicky and they do not have problems of aggression or injury.

There is another matter he would testify to on damages, but as to liability that is it.

I am sorry, one thing, and from his examination he concludes that Nicky can feel pain.

* * * * * * * *

(6-112) THE COURT: I would think that the doctor could testify as to his observations upon examination. That is all, not his opinion as to whether or not the programming he is receiving or the treatment he is receiving at Pennhurst is adequate from his point of view.

MR. PLATT: I am not talking about the medical treatment. It is not a medical malpractice situation. We never said it was.

MR. McGUIRE: You are talking about psychological treatment and the witness testified in his deposition he wouldn't know what programs should be used.

THE COURT: He can testify to his medical observations, that he had a fracture of the arm, the nose and the finger, perhaps even that he could sense pain, but, other than that, it is only for the purpose of establishing damages and his corroboration of damages, but (6-113) not his opinion as to whether or not the program at Pennhurst is adequate for his needs.

MR. PLATT: You have to take into consideration his position also. He is Medical Director of a similar institution.

THE COURT: That makes it all the more a difference in opinion as to how this man should be treated.

That is a malpractice case, not a violation of civil rights.

* * * * * * * *

(6-114) Getting back to your question, the doctor's testimony would be admissible under damages only, not on liability.

If we are going to bifurcate it, I take it your next question would be should we have him here now and the answer is not until we send the issue of liability to the jury.

* * * * * * * *

(7-89) No. 13—

MR. McGUIRE: Your Honor, we object to this charge.

THE COURT: It is not a violation of the Eighth Amendment to fail to provide plaintiff with treatment. It is a violation of the Eighth Amendment if there is a deliberate indifference to the serious medical and psychological needs of the patient.

I will make that modification in No. 13, if plaintiff will accept it.

I am talking about the second sentence.

MR. TIRYAK: The second sentence?

THE COURT: Yes.

MR. TIRYAK: Would Your Honor have—

THE COURT: I am using the language of Estelle versus Gamble. It says if you find the defendants have failed to provide plaintiff with such treatment.

The Eighth Amendment does not require such treatment. The Eighth Amendment does require that you not be indifferent to the medical or psychological needs of the patient.

MR. McGUIRE: Your Honor, if I may speak further to this, if the Court intends to apply Estelle versus Gamble, I would say the first sentence of this charge is somewhat misleading.

It states there is a duty on the part of the (7-90) defendants to provide this very kind of training.

It would seem to be contradictory to say in the first sentence the duty exists and in the second sentence to say it does not. Therefore, we would request the entire charge be thrown out.

Furthermore, the record is entirely clear the plaintiff is not being held against his will.

MR. TIRYAK: We are not going to argue the evidence at this time, it seems to me, Your Honor.

The purpose of the instruction has to do with the question of the purpose of commitment of a mentally-ill person.

As I stated before, he is not committed for any purpose other than to provide him treatment. He could not be involuntarily confined there at a mental institution for any other reason than to give him treatment. It has to do with his personal liberty, and that goes to the O'Connor versus Donaldson case, which the Supreme Court decided, and which the court said they could not keep a resident at a mental institution unless they provided him treatment.

MR. McGUIRE: Your Honor, the unrebutted evidence in this case—

MR. WHEELER: Your Honor, this request for charge goes much further. It says with such treatment as will afford him a reasonable opportunity.

That is directed to quality and kind of treatment. (7-91) that is not what the Donaldson case says.

MR. TIRYAK: Your Honor, that language was taken from Judge Broderick's decision with respect to the duties owed by the officials at Pennhurst to the residents.

MR. McGUIRE: Your Honor, even if Judge Broderick's language is used, it is clear that language doesn't apply to the defendants in their individual capacities.

To be sure, Pennhurst may have that duty. However, Pennhurst is not on trial.

THE COURT: I think we have to try to zero in on these individual defendants, not the school itself.

MR. McGUIRE: These defendants, as individuals, owe nothing to Nicholas Romeo. Pennhurst owes a duty to him in some fashion.

Whether that duty is being carried out by Pennhurst, is not the subject of this litigation.

MR. ROMEO: Your Honor, the state has chosen these individuals.

THE COURT: The state is not a defendant here.

MR. TIRYAK: I understand that, but they have been delegated as state public officials.

THE COURT: Yes, but they are being sued in their individual capacity for violating the constitutional rights of this plaintiff.

MR. TIRYAK: That's correct, Your Honor.

(7-92) THE COURT: They are not being sued because they failed to give him care. They are being sued because they violated his constitutional rights.

MR. TIRYAK: Your Honor, if a police officer were to assault someone unjustifiably, one could recover damages against him under—

THE COURT: Individually. You can't recover against the City, though.

MR. TIRYAK: Correct, but even though he is acting as a public official, if you could show he was misusing the authority given to him—

THE COURT: Right, you have to show he was acting under color of law.

MR. TIRYAK: That's correct.

MR. McGUIRE: But, Your Honor, the distinction between that situation and the one before this Court is that it has already been conceded these defendants have done nothing personally to violate Nicholas Romeo's civil rights.

THE COURT: If they concede that, I would have to grant your motion.

MR. TIRYAK: That is not conceded.

MR. McGUIRE: We would submit the policeman illustration is entirely different. The policeman, as a public employee, is not entitled to step out to enjoy the protection of the state while he goes about battering citizens.

(7-93) THE COURT: I will use the language of Estelle versus Gamble which says if you find the defendants were deliberately indifferent to the medical and psy-

chological needs of Nicholas Romeo then you may find the plaintiff's Eighth Amendment rights were violated.

As modified, that is 13.

No. 14 is denied. As I have stated again and again, this is not a malpractice suit.

It makes no difference that somebody else would have done it differently.

* * * * * * * *

CHARGE OF THE COURT

(8-16) Plaintiff asserts that his constitutional rights were violated by the defendants in four ways. He first contends that defendants' failure to provide him with a reasonable degree of protection from repeated assaults by patients and staff at Pennhurst violates his rights under the 8th Amendment to the United States Constitution.

The 8th Amendment of the United States Constitution forbids the infliction of cruel and unusual punishment upon persons confined to institutions. The 8th Amendment specifically says excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

Thus, if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo, such failure to act deprived the plaintiff of rights guaranteed by the 8th Amendment.

Plaintiff, Romeo, also contends that his 8th Amendment right to be free from cruel and unusual punishment was violated after this lawsuit was filed by the defendants unnecessarily shackling him to his bed or chair and denying him the opportunity to participate in the same treatment and programs as other residents at (8-17) Pennhurst.

Plaintiff contends that defendants shackled him and denied him programs to punish him for filing this lawsuit.

If you find that any or all of the defendants shackled or caused Nicholas Romeo to be shackled to his bed or chair, or denied him programs as a punishment for filing

this lawsuit, those acts deprived plaintiff of his rights guaranteed by the 8th Amendment.

On the other hand, if you find that these acts were taken by the defendants in a good faith effort to treat Nicholas Romeo's condition, then, of course, you should find for the defendants.

The plaintiff also contends that his rights under the 14th Amendment to the United States Constitution were violated by the defendants.

The 14th Amendment to the Constitution provides in relevant part that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the (8-18) laws."

Under the 14th and 8th Amendments, state officials at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff.

Plaintiff, Nicholas Romeo, contends that these defendants violated such a duty to protect him because they were aware of such attacks and failed to take such reasonable steps as required to protect him.

If you find that the defendants were deliberately indifferent to the medical and psychological needs of Nicholas Romeo, then you may find that plaintiff's 8th and 14th Amendment rights were violated.

Now, ladies and gentlemen, this case is not a malpractice case. You are not to decide whether Nicholas

could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case.

The issue here is whether or not his rights were violated.

Malpractice, that is, the failure to properly treat somebody or negligently treat somebody, does not become a constitutional violation merely because the victim is committed to the custody of a state institution.

(8-19) In order to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident. It is only such indifferences that can offend the standards of decency required by the 8th Amendment.

To find for the plaintiff you need not find that the defendants personally participated in any attack upon the plaintiff. If you find that the defendants were aware of repeated attacks upon plaintiff and failed within their sphere of authority to take reasonable steps to protect the plaintiff, then you may find that the defendants are liable for a violation of the plaintiff's constitutional rights.

On the other hand, if you find that the defendants took all reasonable steps under the circumstances to protect Nicholas Romeo from harm, then you should find for the defendants.

In evaluating the evidence and in determining whether any of the defendants have violated Nicholas Romeo's civil rights, the fact that Nicholas Romeo was injured on occasion, regardless of how many times, does not mean that the defendants caused that injury or that they violated his civil rights.

The mere fact that Nicholas was injured on one or more occasions does not permit you to draw the inference (8-20) that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent.

In order to show that the treatment of Nicholas Romeo was adequate under the Constitution the defendants need not show that the treatment would cure or improve Nicholas' condition, but only that they made a good faith effort to do so.

The treatment program, including treatment of the mentally retarded in residential groups, does not violate the Constitution merely because it has a negative therapeutic effect or because it has other undesirable side effects.

The plaintiffs have to prove a violation of Mr. Romeo's constitutional rights. The defendants, of course, as I stated earlier, contend his rights were not violated, but they also contend that even if his rights were violated, the actions they took were taken in good faith and, therefore, under the law they are not liable.

If based on the evidence in this case you find that the defendants or any of them violated plaintiff's civil rights, you must then consider whether or not they are entitled to immunity because they acted in good faith.

Good faith means a reasonable reliance on (8-21) the existing procedures and a reasonable belief in their validity at that time.

Immunity means they are not liable even if you found they violated the plaintiff's civil rights.

Under the law the defendants are entitled to immunity unless they knew or should have known that the action which they took within the sphere of their official respon-

sibility would violate Nicholas Romeo's established constitutional rights or if they acted with a malicious intent to cause a deprivation of his civil rights or other injuries.

In considering the evidence in this case you must remember that a mentally retarded patient has the same constitutional rights, but under the law the defendants cannot be held liable for the deprivation of any of plaintiff's civil rights unless they intended the acts which caused the violation of his civil rights, nor can they be held responsible for acts of their subordinates unless you conclude that each defendant had personal knowledge or reason to know that the subordinates were violating Nicholas Romeo's civil rights, had an opportunity to intervene or prevent such conduct and failed to do so.

However, if you find that the defendants did not personally act or fail to act which conduct resulted (8-22) in the violation of Nicholas Romeo's constitutional rights, then even if some other person who is not a party violated the plaintiff's rights, you must return a verdict for the defendants and against the plaintiff.

If you conclude from the evidence that Donnie James struck Nicholas Romeo in the shower, that fact, standing alone, is not sufficient to hold these defendants for violating Mr. Romeo's civil rights. In other words, the mere fact that someone else may have violated Mr. Romeo's civil rights, it does not necessarily follow that the defendants did so, even though he was a subordinate, as I explained to you earlier.

In order to establish this good faith defense each defendant has the burden to establish that by a preponderance of the evidence that his or her actions or inactions were made in good faith.

Ladies and gentlemen, I am not going to review the evidence. I think counsel has presented their respective positions to you ably and well and have reviewed the evidence for your benefit.

I have just given you the law which is applicable to this case and now it is your duty to deliberate and to return a verdict in accordance with the evidence and

* * * * * * * *

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 80-1314/1315 & 80-1596

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

v.

DR. INGRE RUDOLPH PLANTE; COMMISSIONER OF INSTITUTIONS AND AGENCIES, ANN KLEIN; MEDICAL DIRECTOR OF NEW JERSEY STATE HOSPITAL, NEW JERSEY MENTAL HEALTH COMMISSIONER, DR. MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, GOVERNOR; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, CHIEF JUSTICE

ALLEN B. SCOTT, *Appellant*

IN NOS. 80-1314 & 80-1596

DR. INGRE RUDOLPH PLANTE, ET AL

Appellants in No. 80-1315

On Appeal From the United States District Court for the District of New Jersey

(D.C. Civil No. 73-1052)

Argued September 18, 1980

Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

(Opinion filed Feb. 5, 1981)

Michael J. Weintraub, *Esquire*
(Argued)
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Attorneys for Dr. Ingre Rudolph Plante, Ann Klein, Dr. Martin Weinberg

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Allen Bodine Scott appeals, and certain defendants cross-appeal, from a final judgment which disposed of all Scott's claims after trial of his numerous complaints charging violations of his civil rights. Several of those claims were submitted to a jury, which returned a verdict in his favor on two of them and in favor of the defendants on

one. On a post-trial motion the district court granted partial relief from the verdicts in Scott's favor. Those claims that were not submitted to the jury were tried to the court, which denied all requests for injunctive, declaratory and habeas corpus relief. What remains is a judgment on the jury verdict of one dollar nominal damages for violation of Scott's constitutional rights. We vacate and remand for further proceedings consistent with this opinion.

I.

Scott has been involuntarily confined to the Vroom Building, a maximum security section of the Trenton State Psychiatric Hospital, for approximately 25 years. In 1954 he was indicted by a grand jury in Burlington County, New Jersey, for the murder of his grandmother. In February 1955 a hearing was held in Burlington County in which a jury determined that he was mentally incompetent to stand trial, and an order was entered that he be removed from the County jail and confined to Trenton State Hospital "until such time as he may be restored to reason, but not to be released from such confinement except on the order of this court."[1] Scott was placed in the Vroom Build-

[1] The hearing was held pursuant to N.J.S.A. 2A: 163-2 (repealed 1978) which read in relevant part:

> If any person in confinement under commitment, indictment or under any process, shall appear to be insane, the assignment judge, or judge of the county court of the county in which such person is confined may, . . . institute an inquiry and take proofs as to the mental condition of such person. . . . It shall be competent for the judge, if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.
>
> . . . .

ing, where he has remained continuously, except for brief periods when he was returned to Burlington County to stand trial on the indictment. No trial ever took place. On October 7, 1968 the indictment was dismissed on the ground that Scott was insane when the offense was committed. Upon the dismissal of the indictment he was returned to Trenton State Hospital "until the further order of [the Burlington County] Court."[2]

In July of 1973 Scott filed in the District Court the first of a series of pro se complaints addressed to the fact and conditions of his confinement in the Vroom Building. By December 30, 1974 five such complaints had been filed.

(*Footnote* 1 continued:)

> If it shall be determined after hearing as aforesaid that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason, and no person so confined shall be released from such confinement except upon the order of the court by which he was committed. This section shall not be construed to prevent the use of the writ of habeas corpus.

[2] *See* N.J.S.A. 2A:163-2 (repealed 1978). The legal problems arising out of the order incarcerating a defendant found not guilty by reason of insanity are discussed in our prior opinion. Scott v. Plante, 532 F.2d 939, 948-49 (3d Cir. 1976). The current state law provisions, codified at N.J.S.A. 2C:4-6 (Supp. 1980), grant the judge discretion to commit civilly the accused to "an appropriate institution."

Scott repeatedly requested appointment of counsel pursuant to 28 U.S.C. §1915(d), but all such requests were denied. Early in 1975 all his complaints were summarily dismissed, and Scott appealed. We granted a motion for a certificate of probable cause, 28 U.S.C. §2253, and appointed counsel. In *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976), we reversed. Reviewing his complaints and the pleadings and affidavits on file, we discerned five separable claims:

> 1. That he had been subjected to the involuntary administration of psychotherapeutic substances, 532 F.2d at 945;
>
> 2. that he was being confined in the Vroom Building without treatment, 532 F.2d at 947;
>
> 3. that the physical conditions at the Vroom Building subjected him to violations of federally protected rights, 532 F.2d at 947;
>
> 4. that his confinement in the Vroom Building after the dismissal of the indictment was unconstitutional, 532 F.2d at 948; and
>
> 5. that the procedures by which New Jersey determined from time to time that his confinement must continue did not meet minimum federal due process requirements, 532 F.2d at 949.

We held that the district court erred in granting summary judgment on Scott's involuntary medication claims, and in granting a Rule 12(b)(6) dismissal on each of the remaining claims. In remanding for further proceedings we suggested that his request for the appointment of counsel pursuant to 28 U.S.C. §1915(d) be given serious consideration, 532 F.2d at 950.

II.

This court's judgment reversing dismissal of Scott's complaints was received by the District Court on April 21, 1976. On August 17, 1976 the court appointed Michael J. Weintraub, Esq. to represent him. Scott was dissatisfied with this appointment, and moved that the court dismiss Mr. Weintraub, and appoint instead David Ferleger, Esq. of the Mental Patient Civil Liberties Project in Philadelphia. On September 2, 1976 that motion was denied. No progress was made in disposing of the case for a considerable period. Meanwhile Scott filed pro se applications for interim relief in the form of the appointment of a manager to run Trenton State Hospital and stop the abuses of which he complained, and for a change of venue. On November 21, 1977 an order was entered:

> 1. Michael J. Weintraub, Esq., of 227 East Hanover St., Trenton, N.J. 08608 is appointed as guardian ad litem for the plaintiff, Allen Bodine Scott, for these consolidated actions, and is to serve in that capacity as well as his attorney.
>
> 2. The stay of these consolidated proceedings pending appointment of a guardian ad litem is vacated.
>
> 3. The requirement that a single amended complaint be prepared and filed is vacated, but without precluding the taking of that step at or before entry of pretrial order.
>
> 4. The consolidated cases will be reinstated to the active civil calendar.

The order is unusual in several respects. First, there is nothing of record disclosing by what procedure or on what authority the court acted in appointing a guardian

ad litem.[3] Second, there is no record of any order staying the proceedings pending such an appointment. Third, there is no record of an order requiring the filing of a single amended complaint. However, the absence of significant docket entries between September 2, 1976 and November 21, 1977 suggests that some action was taken by the court to stay the cases for reasons unknown.

On January 25, 1978 Michael J. Weintraub filed an amended complaint, bearing the docket numbers of the five consolidated cases which were before us on Scott's prior appeal. The prayers for relief of the amended complaint are quoted in the margin.[4] The factual allegations, while more concisely and artfully set out, preserve all the claims which we previously considered. The prayers for relief included virtually all modes of relief which it is

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[3] There is a docket entry on April 12, 1976 referring to an "order to show cause reappointing two independent expert witnesses, who are psychiatrists, to examine the plaintiff, etc." The certified record, however, lists this document (and many others) as "missing." There is no docket entry or record document disclosing any disposition of the order to show cause.

[4] WHEREFORE, plaintiff demands that this Court:

A. Issue an order that the plaintiff be released since his confinement is illegal in that the standard applied in his commitment, hearing was a liberal one whereas the standard applied in determining his release has been a more stringent test;

B. Ordering that the plaintiff be released from his confinement for the failure of the defendants to treat or otherwise attempt to rehabilitate the plaintiff;

C. In the event that this Court does not find that the plaintiff is entitled to release as requested in paragraphs A & B, that this Court enter an Order transferring the plaintiff to the civil section of the hospital in accordance with the requirement that the least restrictive means of confinement be utilized;

within the power of the court to grant to the plaintiff. An answer was filed on behalf of all defendants on February 23, 1978. Thereafter on March 13, 1978 the court filed a memorandum and order granting leave to file an amended complaint. The memorandum and order refer to a prior order directing that an amended complaint be filed, and to an order vacating the order, neither of which appear of record. The memorandum also refers to another Scott complaint, No. 78-2367, in which he seeks habeas corpus relief, and directs that it be consolidated with the five cases we had previously consolidated. An order to

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(*Footnote 4 continued:*)

D. Enter a declaratory judgment that the utilization of a less stringent test for the plaintiff's original commitment and the utilization of a more stringent test for his release to be violative of the plaintiff's right to due process under both the United States and New Jersey State Constitutions;

E. Enter a declaratory judgment that the standard of proof to be applied in release hearings in determining whether or not the plaintiff is either a danger to himself or to others be that standard of proof beyond a reasonable doubt;

F. Enter a declaratory judgment that in the event that the confinement of the plaintiff is warranted, it must be the least restrictive confinement;

G. Enter a declaratory judgment that if the confinement of the plaintiff is found to be warranted, that an individual treatment plan specifically designed for the plaintiff alone, must be immediately implemented within thirty (30) days;

H. Enter a declaratory judgment that if the confinement of the plaintiff is warranted, that the defendants must provide for adequate medical and psychiatric care, and that the same should include at a minimum, the requirement for a complete physical once every six (6) months;

I. Enter a declaratory judgment that the defendants' failure to provide for sanitary and otherwise minimally humane living conditions, including adequate heat, constitutes a

that effect was entered on October 3, 1978, and the defendants' answer to the complaint in No. 78-2367 was filed seven days later. On October 18, 1978, thirty months after our mandate was received by the district court, a status conference was held. There is no record of what transpired at this conference. Nothing more transpired about scheduling the cases for trial until February 15, 1979, when the district judge to whom it was assigned sent a memorandum to Mr. Weintraub, and to the District Court clerk, but not to the Attorney General who was representing the defendants asking to be advised "as to necessary time for final trial preparation so date can be set." Meanwhile Scott sent to this court and to other places a number of letters asking for disposition of his case. Finally, on April 23, 1979 an order was entered by the Chief Judge of the District Court reassigning the case to himself and reallocating the place of trial from Newark to Trenton. Chief Judge Fisher promptly scheduled a trial date and issued a writ of habeas corpus ad

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(Footnote 4 continued:)

violation of the plaintiff's constitutional rights to be free from cruel and unusual punishment;

J. Enter a declaratory judgment that the failure to allow the plaintiff at hearings to determine his release to produce witnesses on his own behalf, to have the hearing open to the public, and to be furnished with a written decision containing a statement of the reason for the decision, constitutes a violation of plaintiff's constitutional rights to a meaningful hearing under the due process clause of both the New Jersey State and United States Constitutions;

K. Enter an order preliminarily and permanently enjoining the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction or under their control, from further ad-

testificandum for Scott's appearance. The trial commenced on May 31, 1979, 37 months after the date our mandate reached the district court, and 58 months after Scott first sought relief in the district court.

III.

At the trial Scott testified and also presented the testimony of Dr. Robert Sadoff, a psychiatrist, and 58 exhibits. The exhibits were for the most part excerpts from the records about his condition and treatment maintained by Trenton Psychiatric Hospital during the course of his stay. Others dealt with the physical condition of the Vroom Building. Still others were written complaints by Scott and by his mother to various state officials, including defendants, respecting his treatment and the conditions he was being subjected to.

At the end of the plaintiff's case the court, on motion by the Attorney General, dismissed the State of New Jersey as a defendant, ruling that it was not a "person" sub-

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(Footnote 4 continued:)

ministering any medication without first obtaining the proper consent in accordance with law;

L. Entering preliminarily and permanently a mandatory injunction to compel the defendants, their agents, successors, employees, and all other persons acting in concert or in participation with them or at their direction or under their control, compelling them to provide a sanitary cell, providing heat in the cell which heat should be at a minimum of 68° during the day and at a minimum of 60° during the night, and otherwise provide for minimally humane and safe living conditions;

M. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or in participation with them, or at their direction or under their control,

ject to suit under 42 U.S.C. §1983. The court also dismissed as defendants Governor Brendan T. Byrne, on the grounds that there was no evidence he either participated in or knew of and allowed continuance of any wrong to Scott, and the Chief Justice and members of the Supreme Court of New Jersey, because "I can't tell the Supreme Court to enforce their rules. . . ." (Transcript, June 6, 1979, at 44). Motions to dismiss were rejected as to the remaining defendants, Dr. Ingre R. Plante and Dr. Martin

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(Footnote 4 continued:)

to provide an individual treatment plan designed specifically for the plaintiff alone within thirty (30) days;

N. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction, or under their control, to provide that hearings to determine the release of the plaintiff be opened to the public and that the plaintiff be allowed to present witnesses on his behalf, and that the plaintiff be allowed to receive a written decision which decision shall include a statement of reasons for the decision;

O. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction or under their control, to provide a law library for the plaintiff or in the alternative access to an existing law library in order that the plaintiff's access to the courts not be further impeded;

P. Judgment for damages, both compensatory and punitive, for the illegal detainment of the plaintiff, for the failure to provide an individual treatment plan for the plaintiff, for the failure to otherwise provide adequate medical and psychiatric care and treatment for the plaintiff, for the failure to provide minimally humane and safe living conditions, and for the administration of medication without first having obtained the proper consent.

Weinberg, who each held the positions of Chief Executive Officer and Medical Director of Trenton Psychiatric Hospital, and Ann Klein, State Commissioner of the Department of Institutions and Agencies, of which Trenton Psychiatric Hospital is a part.[5] The court also dismissed all of Scott's state law claims, which included false imprisonment, assault and battery, and malpractice. Neither the transcript nor the court's post-trial opinion discloses whether the state law claims were dismissed for failure of proof or as a matter of discretion with respect to the exercise of pendent jurisdiction. The effect of these rulings was to dismiss the State, the Governor, and the Supreme Court of New Jersey not only on the damage claims which were going to the jury, but also on any claims for injunctive or declaratory relief on either state or federal grounds. Dismissal of the pendent state law claims also withdrew from the case any possibility of an award of money damages or injunctive or declaratory relief on those claims.

The defendants' case included the testimony of Harvey Musikoff, Acting Chief Executive Officer of Trenton Psychiatric Hospital, who was from October 1977 to April 1978 Chief of the Forensic Section of that hospital, contained in the Vroom Building, Dr. Musikoff holds a Ph. D. in rehabilitation counseling and has taught forensic psychology. While he was on the stand five packets of hospital records, Exhibits D-1 through D-4 and Exhibits D-8, were marked in evidence, comprising all records relating to Scott for his entire stay in Vroom. The defendants also introduced Exhibit D-5, a group of documents dealing with requests to the Governor and the Legislature

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[5] The Attorney General represented all defendants. No cross-claims were filed.

for additional funding for the Vroom Building over the past four or five years. Finally Exhibits D-6 and D-7 included various New Jersey State court orders dealing with Scott's confinement. The defendants presented no medical testimony. None of the three defendants left in the case testified. Instead, at the close of Dr. Musikoff's testimony they renewed their motion to dismiss the complaint. The court denied that motion.

IV.

Only the claims for money damages were submitted to the jury. Those were submitted in the form of special verdict interrogatories to which the defendants made no objection. The interrogatories and the jury's answers are as follows:

1. Was the plaintiff deprived of adequate treatment while at Trenton State Hospital Forensic Unit? Yes

2. If the answer to No. 1 is "yes," was that deprivation the proximate cause of injury and damage to plaintiff? Yes

3. Was plaintiff forced to undergo harmful or painful modes of treatment over his refusal? No

4. If the answer to No. 3 is "yes", was it the proximate cause of injury and damage to plaintiff?

5. Were the physical conditions at the Vroom Building such as to amount to a deprivation of due process? Yes

6. If the answer to No. 5 is "yes", was it the proximate cause of injury and damage to plaintiff? Yes

7. Do you find liability as to any of the following defendants? Yes

Ingre R. Plante, M.D. Yes
Ann Klein Yes
Martin Weinberg, M.D. Yes

8. Compensatory Damages $15,000.
Punitive Damages $10,000.

Thus the case was, with the defendants' apparent acquiescence, submitted on three separate theories, against three separate defendants, but with a request for a single verdict on compensatory damages and a single verdict on punitive damages. It appears, therefore, that the jury found the defendants jointly and severally liable for compensatory and punitive damages. The special verdict interrogatories predicate liability on deprivation of adequate treatment and on deprivation of due process with respect to the conditions of incarceration in the Vroom Building, but do not separate the damages among the two bases of recovery. Since the defendants did not in the trial court object to the form of the interrogatories either before or after the verdict, and do not on appeal argue that they were prejudiced by the way the questions were formulated, we must read them in a manner which reconciles them with the jurors' probable intention in light of the Court's instructions. *Cf. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.* 369 U.S. 355, 364 (1962); *Bernhart v. Dollar Rent A Car Systems, Inc,* 595 F.2d 914, 917 (3d Cir. 1979) (resolution of facially inconsistent answers to special interrogatories).

> In its instruction to the jury the court observed that the plaintiff breaks his claims against defendant[s] down to three categories: First, the right to treatment, secondly, the right to refuse treatment and thirdly, that the conditions of the Vroom Building,

> that is as you have heard them, were a violation of his Constitutional rights to due process.

The jury's verdict was adverse to Scott on the alleged violation of a right to refuse treatment, and he does not on appeal raise any question about that verdict. Thus we are concerned only with his right to receive treatment and his condition of confinement claims.

On the right to treatment claim the Court charged:

> Now, while the plaintiff was confined to Trenton State Hospital, Forensic Unit thereof, which you have heard so much about, he had a right to adequate medical treatment. This right arose from the 14th Amendment of the United States Constitution which provides no State shall deprive any person of life, liberty or property without due process of law. Plaintiff was committed because he was dangerous to himself and to others. That is in the first instance. Remember, he has never been convicted of a crime. In exchange for his commitment which society was entitled to, the State owed plaintiff adequate medical treatment. You, the jury, must decide whether plaintiff received the treatment which was owed.

Although the defendants contended in the trial court, and contend here, that an involuntarily committed patient has no federally protected right to treatment, they made no objection to the quoted portion of the charge; in particular, they made no request for a more specific definition of adequate treatment, and made no objection to the language "he had a right to adequate medical treatment." In *Romeo v. Youngberg*, No. 78-1982, (3d Cir. Nov. 25, 1980) (en banc) we held that the involuntarily committed mentally retarded have a constitutionally protected right to treatment, and the analysis of that case is for fourteenth

amendment purposes equally applicable to the involuntarily committed mentally ill. *Id.*, slip op. at 32 n.53. Thus we have rejected the defendants' basic position that there is no federally protected right to treatment. The quoted portion of the charge is less complete with respect to such a right than the one which in *Romeo v. Youngberg, supra,* we held to be appropriate,[6] but no more specific charge was requested and no objection was made. The charge informed the jury, correctly, that Scott, as a patient involuntarily committed for mental illness, had a right to treatment, and the verdict reflects the jury's conclusion that he was deprived of that right.

As to the conditions of confinement, the Court charged:

> Now . . . [Scott] also contends that the conditions at the Vroom building amounted to punishment

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[6] Proposed jury instructions were set forth in an appendix to *Romeo*:

> A. If you find that the plaintiff was involuntarily committed for treatment, and no treatment was administered, and no compelling explanation for the lack of treatment was offered, you may hold the defendants liable.
>
> B. If you find that the plaintiff has received some treatment, you must then determine whether the treatment is regarded as acceptable in light of present medical or other scientific knowledge. If you find that it is not acceptable, you may find for the plaintiff. In addition, if the evidence does not demonstrate that there is a relationship between the treatment administered and the plaintiff's needs, even if the treatment is arguably regarded as acceptable in other situations, then you may find for the plaintiff. In deciding upon the adequacy of the treatment program adopted you may consider the defendants' explanations regarding security concerns, administrative necessities and fiscal constraints.

Slip op. at 42.

without due process of law and violation of the Civil Rights Act.

You have heard evidence which described the conditions of the Vroom building in which plaintiff has been confined for 24 years. You must remember that at no time was plaintiff convicted of a crime. Therefore, I Charge you that the State could not Constitutionally punish him. You must determine whether the conditions existing in the Vroom building amounted to punishment.

Not every disability or loss of liberty which plaintiff has experienced is punishment. You must remember that the State originally saw fit to confine him because he was deemed to be dangerous but unable to stand trial. Loss of some freedom of choice and privacy are inherent in confinement and do not rise to the level of punishment, and the fact that detention interfered with the plaintiff's desire to live as comfortably as possible and with as little restraint as possible did not mean that he was being punished. A number of factors should guide your decision of whether plaintiff was being punished.

Were the conditions and disabilities of Vroom imposed by officials for the purpose of punishment? If not, then is the condition which you are considering reasonably related to a legitimate government objective, or is it arbitrary or purposeless? Besides the State's objective of keeping a dangerous individual off the streets, you should realize that the government has a legitimate interest that stem [sic] from it's [sic] need to manage the facility in which plaintiff was detained. These governmental interests include the maintenance of security and order at the

> institution. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, amount to punishment. However, if the conditions or restraints are excessive in relation to the State's non-punitive purpose, you may find they constituted punishment.

This charge gives meaning to the jury's answer to interrogatory No. 5. That affirmative answer establishes that the jury concluded that Scott, who has not been convicted of a crime, has been confined in the extremely harsh restrictive conditions of the Vroom Building for reasons not related to legitimate government objectives, i.e., as punishment. Defendants did not object to this portion of the trial instructions, and none of their requests to charge are inconsistent with it.

Having charged the jury that Scott had a right to treatment and a right to be free from punishment the court turned to the issue of personal responsibility. In that respect the Court charged:

> If you decide that plaintiff was given adequate treatment, you need decide no more. But if you find his treatment was inadequate, you must next determine whether either Ann Klein, Dr. Ingre Rudolph Plante, or Dr. Martin Weinberg were responsible for the denial of treatment.
>
> Since Ann Klein was not involved with the day-to-day running of the institution, you obviously won't be able to find that she actually participated or acquiesced in any denial of treatment. She can only be liable if you find that she had actual knowledge of the Vroom building's inadequate treatment of the plaintiff, while having the power to authorize or im-

plement better care for him. You could find this knowledge, not only by direct evidence, but also by proof, that defendant Klein normally exercised reasonably close supervision over the defendants personally charged with the plaintiff's care and that those defendant's [sic] acts or omissions were open and not surreptitious.

With respect to Doctors Plante and Weinberg, you could apply the same test in determining whether they had actual knowledge to [sic] the inadequacies of plaintiff's treatment and also, had the resources in [sic] authority to remedy the situation.

Plante and/or Weinberg might also be liable for their actual participation in a denial of plaintiff's rights by denying him a right to treatment. You must decide whether either of those two doctors actually was engaged in a course of conduct calculated to deny plaintiff his right to treatment.

The defendants did not object to this portion of the charge. They did, however, request a charge on vicarious liability, and urge as error the Court's failure to give it.[7] The charge as given, however, is substantially as requested and accords with the standard for personal liability in §1983 actions set forth in *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976). The charge on personal responsibility deals specifically only with fail-

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[7] The charge requested is:

"It is well settled in this circuit that liability based directly upon 42 U.S.C. §1983 cannot be based on a theory of vicarious liability, but instead requires actual participation in the unlawful conduct, or actual knowledge of an acquiescence in that conduct." Coggins v. McQueen, 447 F. Supp. 960, 966 (E.D. Pa. 1978).

ure to treat Scott. Defendants made no objection, however, to the court's failure to relate that portion of its instruction to the unlawful punishment claim, and made no request for a charge addressed to that issue.

Finally the Court turned to the issue of official immunity, charging:

> Now, the defendants in this case are All State Executive Branch officials. They claim that they are immune from having to respond in money damages to plaintiff's claim. This claim of immunity is offered as a defense to plaintiff's claim and the officials have the burden of convincing you by a preponderance of the evidence that immunity should attach.
>
> There are two components to the immunity defense. Keep in mind also, that plaintiff has a number of claims which you must keep distinct for purposes of applying the defense.
>
> If you find that plaintiff was subjected to punishment without due process, you must decide which of the defendants, if any, knew or should have known of plaintiff's right to be free from punishment and if they knew or should have known that their conduct or omission would or did violate the law. The foregoing inquiry is relevant only to the issue of punishment through conditions.
>
> The immunity defense would be unavailable to defendants on all plaintiff's claims, right to treatment, right to refuse treatment and punishment, if you find that any of the defendants acted or failed to act with malicious intention to deprive the plaintiff of a right or to cause him other injury. For the purpose of determining whether any defendant possessed malice,

> you must decide whether or not he intended the consequences of his conduct or omission.

The charge as given was not objected to. It must, however, be contrasted with several instructions requested by the defendants. Most of them were properly rejected because they were framed in such a manner as to place the burden of offering evidence and of persuasion on the plaintiff. We have held that qualified immunity is a defense on which the defendants have the burden of proof. *Skehan v. Bloomsburg State Teachers College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979).

One request, however, is worthy of note. The defendants asked for a charge:

> Monetary damages can only be assessed against a defendant if he or she "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff]. . . .
>
> "For purposes of this question, an official has, of course, no duty to anticipate constitutional developments." *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975).

The defendants contend that the charge as given fails to comply with *O'Connor v. Donaldson's* "two-step test for official immunity" (Appellee's Brief 3-D), although their brief does not elaborate. The charge as given provided, with respect to all of plaintiff's claims, that the immunity defense "would be unavailable to the defendants . . . if you find that any of the defendants acted or failed to act with malicious intention to deprive him of a right, or to

cause him other injury." The negative implication of the language seems to be that absent malice the defense is available. As to the lesser standard, "that he knew or should have known", the court applied that standard only to the punishment claim. The court's intention seems to have been to require a finding of malice to overcome the immunity defense on the right to treatment claim, while requiring a finding either of malice or of knowing disregard of a known constitutional right with respect to the punishment claim. Such a distinction would be entirely consistent with the position of the defendants, pressed both in the district court and here, that the law with respect to a constitutional right of the involuntarily committed to treatment was highly unsettled. *See Reese v. Nelson*, 598 F.2d 822, 826 (3d Cir. 1979). A fair reading of the charge, then, seems to be that it required a finding of qualified immunity on the right to treatment claim unless malice were shown. This was more than the defendants sought in the quoted request to charge, and on this record possibly more than defendants were entitled to. That this may have been their contemporaneous understanding is confirmed by their failure to object when given an opportunity to do so at the close of the court's instructions. If there was ambiguity in the manner in which the court articulated the immunity charge it could not ordinarily be considered now, for "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51; *see Fisher v. Volz*, 496 F.2d 333, 348 (3d Cir. 1974).[8]

[8] Because a new trial on liability and damages is granted on other grounds to be discussed later, the district court will have an

V.

Thus the legal standards which the court below used to instruct the jury and assess plaintiff's equitable claims were substantially correct. Resolution of the remaining questions on appeal depends on whether the law was correctly applied to the particular facts of this case.

We turn first to Scott's appeal from the judgment dismissing all requests for injunctive, declaratory, and habeas corpus relief. We believe that in two respects the trial court erred in denying equitable relief.

A. Conditions of Confinement

The jury found, and the court agreed, that confining Scott in the maximum security wing of Trenton Psychiatric Hospital amounted to punishment in violation of the due process clause. There was ample evidence that Scott and the other inmates were exposed for twenty four years to subhuman living conditions, including poor plumbing with leaking pipes covering the floor with inches of water; inoperative sinks and toilets; inadequate ventilation; absence of windows or inoperative windows; inability during seven months of the year to go into the yard for fresh air; inoperative radiators resulting in indoor temperatures below 50°; summer temperatures reading 105° due to absence of ventilating equipment; for a time availability of showers only once a week; and absence of hot running water in sinks in the cells. As to many of these gross physical deficiencies the testimony was not even disputed. The record discloses no treatment or security reason for subjecting

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(Footnote 8 continued:)
opportunity to make its charge on the "good faith" defense more specific so that the nature of the defense will be clearly presented to the jury.

Scott and the other inmates to such severe deprivations. To the contrary, there was evidence in the form of hospital records suggesting that Scott has neither engaged in violent behavior nor been a management problem. Indeed, a 1971 report by a Dr. Folmer of the hospital staff recommends that he be placed in a civil ward because of his cooperative behavior. Nevertheless, he remained through trial (and is to date) confined to a prison wing of the hospital which includes sentenced inmates suffering severe mental illnesses.

In the face of such harsh confinement, Scott petitioned for complete release, or, in the alternative, for transfer from the prison wing to a civil ward. The court concluded that the relief of complete release from custody was not, in Scott's present condition, appropriate. That finding is not clearly erroneous. At a minimum, however, this record required that the court make findings of fact as to whether Scott could be housed in surroundings less restrictive of his personal liberty. Courts have a duty to guard against unnecessary personal restraints not only at the confinement stage, which can range from maximum to minimum security.[9] As one court has observed, "It

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[9] Courts have not limited "least restrictive" analysis to a choice between outpatient services and institutionalization. Within this Circuit, the doctrine has been used to make finer distinctions. Thus, in Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977), Chief Judge Lord wrote:

> Fundamental rights are implicated where the state civilly commits an incompetent person to a mental hospital which is substantially more restrictive than other state mental hospitals to which one could be sent.
>
> . . .
>
> We hold that at a minimum, where a state has varying available facilities for the mentally ill which differ significantly in the amount of restrictions on the rights and liberties of

makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization only to abandon the watch once the patient disappears behind hospital doors." *Covington v. Harris*, 419 F.2d 617, 623-24 (D.C. Cir. 1969). In that case, a plaintiff, whose circumstances closely resembled Scott's,[10] was granted a hearing at which the hospital was required to demonstrate that it had considered alternative security accommodations for appellant and to explain why it had found them inadequate. We find Scott is entitled to the same."

(Footnote 9 continued:)

the patients, due process requires that the state place individuals in the least restrictive setting consistent with legitimate safety, care, and treatment objectives.

434 F. Supp. at 1027-28. *See also* Kesselbrenner v. Anonymous, 33 N.Y. 2d 161, 305 N.E. 2d 903, 905 (1973) (transfer of civilly committed patient, believed dangerous, to penal facility for the criminally insane without consideration of less restrictive alternatives held unconstitutional).

[10] Covington was charged with murder, but civilly committed after being found incompetent to stand trial. In ten years at the maximum security pavilion he had never been violent or unruly.

[11] There is no justification for treating material differences among intramural dispositions as *de minimis*. Indeed, the Supreme Court has not ignored differences of degree within the context of criminal incarceration. *Cf.* Wolff v. McDonnell, 418 U.S. 539, 571-72 n.19 (1974) (prisoner entitled to due process safeguards when officials substantially increase the severity of his confinement). The argument for judicial review in the civil commitment context is even stronger.

Although Scott was initially placed under maximum security, this fact does not relieve the state of any obligation to justify continuing imposition of such severe restrictions. *Cf.* Donaldson v. O'Connor, 422 U.S. 563, 574-75 (1975): "Nor is it enough that [the inmate's] original confinement was founded upon a constitutionally adequate basis, . . . because even if his involuntary commitment was initially permissible, it could not constitutionally con-

Precedent in this Circuit supports this conclusion. In *Romeo v. Youngberg, supra,* we held:

> The basis of Romeo's first claim, that he was unduly shackled, is clearly inimical to the right of an unconvicted citizen to be free from punishment. Shackling may not be punishment per se, but it raises a presumption of a punitive sanction. It squarely collides with a traditional liberty interest in freedom from bodily restraint. A valid involuntary commitment *ex necessitate* extinguishes a retired person's right to freedom from any type of confinement. Nevertheless, a residuum of liberty remains which is entitled to due process protection.

Slip. op. at 13-14. After *Romeo* shackling may be justified only by a "compelling necessity" or by showing that it was "the least restrictive method of dealing with the patient in light of his problems and the surrounding environment." Slip. op. at 16. That holding applies, as

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(Footnote 11 continued:)
tinue after that basis no longer existed." Since Scott filed his amended complaint in 1978, the State of New Jersey has itself, recognized that the condition of civilly committed patients is subject to possible change and thus now utilizes mandatory periodic review procedures in state courts to tailor restraints to changed circumstances. *See* New Jersey Court Rules 4:74-7(f) (1980); State v. Fields, 77 N.J. 282, 390 A.2d 574 (1978). When the state fails in a *Fields* hearing to justify continuance of the status quo, the judge "model[s]" a new order providing for "the least restrictive restraints" found "consistent with the well-being of the community and the individual," 390 A.2d at 584. The record shows no such hearing being held in Scott's case and the trial court made no findings as to the reasons why, if any. The analogy to state law does not stay the hand of this court to remedy denial of Scott's federally-protected constitutional rights, but it does suggest that our holding today need not inevitably flood the federal courts with petitions for relief.

well, to Scott.[12] Although Scott was not shackled, the severe restrictions on movement and deprivations of sanitary, healthful conditions experienced by inmates in the Vroom Building qualitatively resemble shackling, and so likewise raise "a presumption of a punitive sanction."

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[12] The fact that Scott is mentally ill and possibly dangerous, rather than retarded, as Romeo was, affects only the nature and weight of the state's justifications for its restraints. *Romeo* left no doubt, however, that all civilly committed patients, both dangerous and non-dangerous, were entitled to have the conditions of their confinement subjected to strict scrutiny. Both enjoy the right of unconvicted citizens to be free from punishment. Both enjoy a right to treatment, and thus to the extent severe physical deprivations and restraints are contra therapeutic, such measures conflict with one of the original rationales for confinement.

Although some patients may be so dangerous that only maximum confinement can adequately protect the safety of others, courts should not conclude that all patients committed on grounds of dangerousness must be so confined permanently. Our understanding of mentally ill persons believed dangerous remains sadly limited; but at least one research study suggests that states may have been employing unnecessarily restrictive forms of confinement for them. The results were reported in Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107, 1136-37 (1972):

> [Baxtrom v. Herold, 383 U.S. 107 (1966)] had the effect of forcing the state of New York to transfer 992 patients from Matteawan, an especially secure hospital for the criminally insane, to regular mental hospitals elsewhere in the State. Researches followed all 992 patients for a year. They found that all but seven of the 992 had fared well enough in less secure, often unlocked facilities that the new hospitals had not seen a need to seek their return to more secure facilities. Indeed, 147 were discharged to the community, far more than would have been released from Matteawan in an average year, and those who remained in regular hospitals seemed indistin-

Our decision in *Romeo* acknowledged as much[13] and indicated that the judicial restraint perhaps appropriate to consideration of inadequate treatment claims should not apply when courts are asked to judge alternative environmental dispositions within the institution. Slip. op. at 14 n.24 & 32 n.55. Although the assignment of a patient to the maximum security wing of a hospital may involve the exercise of medical prognosis, just as the choice of treatment does, the court has a greater obligation to review constraints involuntarily imposed than it does treatments a state offers to willing patients. *Cf.* slip. op. at 25 (limits placed on state's power to impose drastic treatments without patient's consent). Moreover, whereas courts may lack the resources or inclination to evaluate day-to-day therapeutic prescriptions, they are well suited

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(Footnote 12 continued:)

guishable to the staffs from the general hospital population. The study may provide little firm indication of how the same men would have fared if never hospitalized at all or if placed initially in a minimum security hospital, but it should increase courts' skepticism both about claims that a person is dangerous and about claims that hospitalization is necessary. [citations omitted].

[13] We made clear in *Romeo* that our holding extended beyond the use of locks and chains. Deference to administrative and fiscal constraints must give way, we indicated whenever a claimed post-commitment abridgment "reach[es] the status of a gross deprivation or squarely cut[s] across constitutionally protected interests. . . ." Slip op. at 12. Obviously not all unpleasant conditions of confinement, some of which are inherent in large-scale institutions, constitute "gross deprivations." Although no doubt the line between punishment and discomfort is not always a bright one, nonetheless we are convinced that severe restrictions on intramural mobility or unsanitary, climatically extreme conditions which endanger health amount to punishment and cannot be ignored by courts.

to examine a discrete long-term state action such as the fact and conditions of Scott's confinement in the Vroom Building. *Cf. Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 102 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/-1415/1489) (Congressional mandate to courts to enforce least restrictive standards for personal liberty under Developmentally Disabled Assistance and Bill of Rights Act). Any reservations over applying least restrictive analysis to the conditions of temporary detainment[14] must yield when the deprivation of liberty can last as long as 24 years or more.

Scott was therefore entitled to have the court below carefully consider his petition for transfer from the maximum-security pavilion to a civil psychiatric wing of the hospital. Before denying the request, the court must be satisfied that hospital officials have considered the existing alternative residences and found that no less restrictive setting would be sufficient to secure adequate protection from threatened harm.[15] The district court's opinion below contains no findings that the subhuman conditions at the Vroom Building were necessary to the state's legitimate interest in protection,[16] or that Scott's

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[14] *Cf.* Bell v. Wolfish, 441 U.S. 520 (1979) (pretrial detainees, 85% of whom were released within 60 days).

[15] Far from being justified by an overriding state interest, excessive physical restraints would conflict with the state's interest as proclaimed in N.J.S.A. §30:4-24.2(e)(2), which entitles mental patients, civilly committed because dangerous, "to the least restrictive conditions necessary to achieve the purposes of treatment."

[16] Defendants' principal defense at trial for the disgraceful living conditions at the Vroom Building was budgetary constraint. With regard to bodily restraints, *Romeo* expressly indicated that

placement in other, less restrictive surroundings available at Trenton Psychiatric Hospital was ever tried or considered and found unworkable. To the contrary, there are strong indications in the record that he could be moved to a civil ward where his liberty would be less restrained and his surroundings would be more comfortable.[17]

The fashioning of an appropriate decree respecting Scott's future custody is a matter which should be addressed by the trial court in the first instance. But even if it is determined that no place but the Vroom Building is secure enough to house Scott, specific relief from its intolerable physical conditions should be ordered. They are not justified by a "compelling necessity" related to the purposes of confinement. Instead, they are at best the result of insufficient funding, which *Romeo* held was not an adequate excuse. Slip op. at 16.[18]

(Footnote 16 continued:)
"except in emergency situations, inadequate resources or administrative rationales offer an insufficient basis for intrusions of this kind on a fundamental liberty interest." Slip op. at 16.

[17] In addition to Dr. Folmer's report, noted earlier, there was even testimony that such transfer was offered to Scott as an inducement for him to drop this suit.

[18] Although defendants' lone witness, Dr. Musikoff, testified that some physical improvements had recently been accomplished and that several more were planned, nonetheless the budget requests submitted by defendant Klein and introduced as exhibits indicate that such promises provide inadequate assurance. For example, a new forensic facility was proposed, but eventually deleted from 1978 bond issue legislation. Even a $500,000 budget request for "emergency repairs" to the Vroom Building was only listed 12th in priority in the Hospital's capital budget request for FY 1980. As for Scott's placement in a cleaner, improved cell beginning December, 1978, we note that his testimony reveals several

B. *Adequate Treatment*

The jury also found, and the court agreed, that Scott has been unconstitutionally denied treatment. Scott's own testimony, that of his expert, Dr. Sadoff, and the hospital records reveal that no staff member worked with plaintiff individually on a regular basis; that neither a psychiatrist nor a psychologist has seen him individually on any regular basis in the twenty four years of his confinement; that ten years after his confinement a staff physician filed a report that there was no reason to bother trying to treat him; that recently a treatment team was established, but it met with him for only ten to fifteen minutes a month;[19] and finally, that he had not received any psychiatric counseling for almost a year and a half prior to trial. Indeed, it is undisputed that Trenton Psychiatric Hospital lost its hospital accreditation several years ago partly because the treatment offered its inmates was merely custodial and not therapeutic.

The court denied prospective relief, however, noting:

> Although he must be accorded all possible consideration and treatment, plaintiff's medical future cannot be directed through this court, but must depend upon the determination of experts as to his individual requirements and needs. I am satisfied from

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(Footnote 18 continued:)
transfers from one cell to another over the past several years. In light of these considerations—budgetary restraints and the apparent frequency of cell transfers—we believe Scott is entitled to the protection of a specific injunction.

[19] The jury may have been unimpressed with such testimony in light of testimony by plaintiff's expert witness that "suitable" treatment requires one and preferably two or three such sessions per week.

> the information provided at the motion hearing in September that definitive steps have been taken and will continue in order to rectify any deficiencies in that regard.

Memorandum at 10. This is not a satisfactory disposition of Scott's claim for injunctive relief with respect to lack of treatment. It is of course the case that his medical future must depend upon medical judgment as to his individual requirements and needs. *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 114 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489). But he has been substantially without the benefit of such medical assistance for 24 years, he has been in court seeking it since 1973, and even today the State's brief contends that he is not constitutionally entitled to it. The court refers to definitive steps already taken, but there is nothing of record disclosing what those steps are or what assurance there is that they will continue. Scott contends, and we agree, that he is entitled to the protection of a specific injunction.

Scott also contends (1) that the trial court erred in denying his habeas corpus petition to be released completely from custody; (2) that the court erred in denying relief respecting a law library in the Vroom Building. The court's findings of fact on these claims are not clearly erroneous and denial of relief with respect to them was a permissible exercise of discretion. Finally, Scott contends that the court erred in entering judgment in favor of Governor Brendan T. Byrne and the Justices of the New Jersey Supreme Court. There is no evidentiary basis for any damage claim against these defendants, and they do not appear to be necessary parties for the equitable relief we have held should be considered.

VI.

In response to special interrogatories, the jury returned verdicts in favor of Scott as to both the treatment and punishment claims, on the basis of which they awarded both compensatory and punitive damages. Defendants Plante, Klein and Weinberg filed a motion for judgment notwithstanding the verdict or alternatively for a new trial. We must depend on the trial court's recital of the grounds for this motion for it is among the docketed pleadings which in the certified record are "missing." The court treated the motions separately and in considering the motion for judgment notwithstanding the verdict dealt separately with the claims for punitive and for compensatory damages.

A.

Despite the motion for judgment notwithstanding the verdict, the compensatory award was upheld on several grounds. First, the court denied the motion as to the verdict on the treatment claim. Appealing from that denial, defendants urge that as a matter of law a person confined because he is a danger to self or others has no constitutional right to any treatment. That contention lacks merit. Had Scott been at large he might have been in a position to seek the treatment which would alleviate his mental illness. As we have held in *Romeo v. Youngberg, supra*, the state may not both deprive him of the liberty to seek treatment and of the treatment as well.

> The right to treatment or habilitation in the case of the mentally retarded—arises when an individual is involuntarily committed, regardless of whether *parens patriae* or police power grounds provide the major premise for the confinement.

Romeo v. Youngberg, supra, slip op. at 25; *accord, Eckerhart v. Hensley,* 475 F. Supp. 908, 915 (W.D. Mo. 1979).

The defendants also contend that as a matter of law they were entitled to judgment notwithstanding the verdict by virtue of the eleventh amendment, since they were acting in official capacities as state officers. That contention is frivolous. *Ex Parte Young,* 209 U.S. 123 (1908); *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824).

Defendants also urge that they should have been granted judgment notwithstanding the verdict because there is no evidentiary basis for the verdict that they personally violated Scott's rights. In that respect we must examine separately the treatment claim and the punishment claim.

In discussing the propriety of injunctive relief in Part V, we reviewed the evidence indicating that Scott's right to treatment had been violated. In addition to the testimony and hospital records, from which the jury could have found an absence of adequate treatment, there was the opinion of Dr. Sadoff that Scott's chances of improvement were probably diminished by the lack of treatment in the early stages of his institutionalization. Even the one witness presented by the defendants, Dr. Musikoff, conceded that earlier treatment might have led to improvement. Moreover, there was evidence from which the jury could have found that the individual defendants were personally responsible for the lack of treatment or aware of it and in a position to remedy that lack. Such knowledge could be inferred from the fact that the inadequacies of treatment which eventually resulted in loss of accreditation in 1977 must have been apparent long before that time to these

defendants. Also, the jury could find that in addition to receiving complaints from Scott, Commissioner Klein and Dr. Weinberg made occasional on-site inspections of the Vroom Building. Dr. Weinberg even sat in on group treatment sessions which Scott attended and was quoted in his affidavit as saying that he was familiar with Scott's treatment in his role as plaintiff's custodian.

On the basis of this record, the trial court was thus correct to conclude that a judgment notwithstanding the verdict for lack of evidentiary support on the treatment claim would be improper. Although the jury was told to consider the case against each defendant separately, no provision was made for a discrete assessment of damages against each based upon their individual acts. Once again, since the point was not raised by the defendants, it must be deemed to have been waived.

As to the punishment claim, there was likewise ample evidence—reviewed in Part V—that the subhuman living conditions at the maximum security prison wing to which Scott has been confined amounted to punishment. As noted with respect to the discussion of the treatment claim, the jury could find that the defendants knew of his, complaints, of the availability of alternative environments, and of their own power to arrange for them. The jury could have found that there was no treatment or security reason for subjecting Scott to such severe deprivations, in which event, the trial judge instructed the jury they were to find the defendants liable. Therefore, the evidence was sufficient to support the jury's finding that Scott's confinement was unconstitutional under the lenient rationality standard charged by the trial judge, let alone under the "compelling necessity" standard we adopted in *Romeo v. Youngberg, supra.*

Finally, defendants also contend that their motion for judgment notwithstanding the verdict should have been granted because they were entitled to a directed verdict that they were covered by official immunity. The trial court, rejecting that contention, observed:

> The good faith immunity argued by defendants is qualified in nature and not absolute in a §1983 action. The charge properly placed the burden of persuasion for this defense upon the defendants . . . and it was fully within the province of the jury to reject it as they did in making a compensatory award.

Memorandum at 4. We agree. In reviewing a motion for judgment notwithstanding the verdict, we must determine, without weighing the credibility of the evidence, and giving Scott, who secured the jury verdict, the benefit of all reasonable inferences that can be drawn from that evidence, whether reasonable minds could not come to a different conclusion. *See Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1177-80 (3d Cir. 1976), and cases cited. The right to have facts found by a jury, guaranteed by the Seventh Amendment, applies no less to civil rights actions than to conventional tort cases.

Reviewing the record in light of the foregoing strict standard, we cannot say the jury was compelled to find that defendants had established their requisite good faith. First, we note that the violations for which they were found liable are not acts of negligence. Punitive conditions or the absence of any treatment become constitutional violations because the justifications put forward by the state are not compelling.[20] The substance of the viola-

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[20] *See* Instructions I and III-A in the appendix to *Romeo v. Youngberg, supra*, slip op. at 41-42.

tion does not necessarily indicate the individual defendants' state of mind at the time the acts occurred or the reasonableness of their legal position, which, together, are the focus of inquiry for official immunity purposes. Pertinent to that inquiry was testimony from which the jury could have inferred that defendants withheld treatment, despite recognition that institutionalization without such treatment tends to deepen a patient's mental incapacity. Under such circumstances the jury might conclude that the defendants knowingly caused injury to Scott and, therefore, could not in good faith have believed they were acting within the law. Indeed, there was evidence that the defendants acted in disregard of the New Jersey law governing their institution and entitling its patients to adequate treatment and habitation.[21] It was harder still for official immunity to overcome the punishment claim, given that the right of citizens—even in institutions—to be free from inhumane conditions has long been undisputed. *See Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976).

If defendants' position is that they innocently misconceived the law or had found it unsettled, they should have supplied evidence to that effect at trial. The risk of non-persuasion with regard to the qualified immunity defense is placed squarely on the defendants. *Skehan v. Bloomsburg State Teachers College, supra.* Yet none of the named defendants in this case even appeared to testify. The testimony of Dr. Musikoff does not touch on the beliefs of the defendants in the reasonableness of their respective courses of conduct, or on their knowledge of the governing legal standard. Indeed, the record contains no

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[21] *See N.J.S.A.* §30:4-24.2; State v. Carter, 64 N.J. 382, 316 A.2d 449 (1974); State in Interest of RGW, 145 N.J. Super. 167, 366 A.2d 1375 (J & D. R. Ct. 1976).

evidence suggesting that the right to treatment or to be free from punishment was in their mind unsettled. Dr. Musikoff's evidence touches only slightly on the tardy efforts, if any, defendants took to improve Scott's treatment or the conditions of his confinement beginning in 1977. Evidence of budgetary appeals by defendants in recent years to improve treatment and conditions at Vroom Building was certainly admissible, but evidence of their good faith with regard to the institutional population as a whole does not resolve as a matter of law the issue of their good faith towards the individual plaintiff in this case, whose specific plight the jury could have found was utterly ignored. On this record the jury certainly could conclude, as it obviously did, that defendants failed to carry their burden of proof on the good faith immunity defense.

B.

The trial court granted the defendants' motion for judgment notwithstanding the verdict on the claim for punitive damages. Scott appeals from that order. As in the previous discussion of such motions on the liability claims, we must avoid weighing the credibility of the evidence and must give Scott, who secured the jury verdict, the benefit of all reasonable inference that can be drawn from that evidence. The standard is the same as that for the grant of a directed verdict, and in reviewing the record we owe no particular deference to the trial court's determination, but must make our own. *See Fireman's Fund Ins. Co. v. Videfreeze Corp., supra,* 540 at 1177-80.

In addition, we must be mindful of the legal standards governing the award of punitive damages in §1983 actions. The award of punitive damages is authorized by that aspect of the law of torts having to do with admoni-

tion rather than compensation. Such an award punishes wrongdoing beyond the requirements of compensation both as a discouragement of private retribution and as a deterrent against future misconduct The admonitory standard requires that the factfinder determine that the defendants "acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so. . . ." *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978). Moreover,

> . . . although punitive damages are not a favorite of the law and are to be allowed only within narrow limits,
>
> [t]he allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact.

Fisher v. Volz, 496 F.2d 333, 347 (3d Cir. 1974), *quoting Lee v. Southern Home Sites Corporation*, 429 F.2d 290, 294 (5th Cir. 1970).

Mindful of these principles, we nonetheless confess to uneasiness about imposing exemplary damages against these defendants based on the existing record. We note, for example, Commissioner Klein's efforts—albeit unsuccessful—to get money from the legislature for upgrading the Vroom Building. In light of these efforts, we believe an inference of malice or wantonness must be based on more than her specific awareness of Scott's plight derived from two letters, both of which she forwarded to appropriate subordinates. This is not to say that the rec-

ord conclusively vindicates the Commissioner's role in this case. When the evidence is simply too sparse to determine the punitive damages issue one way or another, and plaintiff bears the burden of proving malice or wantonness, *Cochetti v. Desmond, supra*,[22] perhaps a jury award of punitive damages cannot stand.

However, the insufficiency of the evidence on this issue warrants close examination, since the circumstances of this case are somewhat unusual. We traced earlier in Part II, the sluggish treatment of plaintiff's case which eventually required reassignment of the case to Newark from Trenton and prompted quick assignment of a trial date. This unorthodox course of events may explain why no pretrial conference was held, far enough in advance of trial to assist the parties in preparing their case. Realizing for the first time at trial the importance of demonstrating Commissioner Klein's personal responsibility and obtaining subjective evidence, plaintiff's counsel at that time served a subpoena on the Commissioner in order to obtain her testimony. Despite plaintiff's protestations, the trial court quashed the subpoena. That ruling no doubt hampered plaintiff's ability to carry his burden of proof on the issue of punitive damages.

---

[22] Plaintiff cannot be heard to complain that our rejection of defendants' immunity defense necessarily implies sufficient bad faith has been shown to support punitive damages. The defense of official immunity depends on defendants establishing good faith, and we concluded in Part VI-A that they failed to carry this burden. With respect to punitive damages, however, it is the plaintiff who bears the risk of non-persuasion on the issue of malice or recklessness. We, therefore, find nothing inherently inconsistent about upholding the judgment of liability for violation of constitutional rights, while expressing doubts about the award of punitive damages.

We need not decide then whether the lower court's direction of judgment notwithstanding the verdict was valid on the existing record. Even when such a motion is granted, if the insufficiency of evidence is attributable to trial error, the defendants are not entitled to judgment notwithstanding the verdict and the appellate court can order a new trial. *See Derr v. Safeway Stores,* 404 F.2d 634 (10th Cir. 1968); 9 Wright & Miller, Federal Practice & Procedure §2540 at 614 (1971); Fed. R. Civ. P. 50(c)(2), Notes of Advisory Committee at 200. We note, too that the Federal Rules permit a trial judge to order a new trial *sua sponte* within ten days of granting a judgment n.o.v., if he believes it is necessary to ensure substantial justice to the verdict-winner. Fed. R. Civ. P. 59(d). An appellate court should likewise be able to exercise such discretion, especially where as here there existed an alternative motion for a new trial, on which the lower court did not rule, despite the direction in Fed. R. Civ. P. 50(c)(1) to do so.

We conclude then that the issue of punitive damages in this case can only be properly resolved by a new trial, thereby affording plaintiff a more meaningful opportunity to prepare his case against Klein and the other individual defendants through interrogatories or depositions. The court of appeals has broad discretion to grant a new trial as to all or some issues. *Heckman v. Federal Press Co.,* 587 F.2d 612, 619 (3d Cir. 1978). In that case, we emphasized the general rule stated by the Supreme Court:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retired is so distinct and separable from the others that a trial of it alone may be had without injustice.

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931). We are not convinced that complete separation of the damage and liability considerations in this case is possible; therefore we conclude that the better course would be to have all plaintiff's claims for legal relief submitted to the jury on retrial.

VII.

Advancing an alternative motion for a new trial under Fed. R. Civ. P. 59, the defendants urged in the trial court that the liability verdict should be set aside because the verdicts were against the weight of the evidence. The trial court rejected both contentions. In light of our foregoing conclusion that a new trial is necessary on all legal claims, we need not review those decisions.

On damages, however, acting on defendants' new trial motion, the court took an action which was beyond its powers; lest the error recur on remand, we take this opportunity to address it. Concluding that the compensatory damage award of $15,000 exceeded the amount that a jury could properly award, the trial court reduced the award to one dollar. The court did so without affording the plaintiff the option of accepting a remittitur or a new trial. In a case where the facts as to damage are in dispute, the court may not do this without violating the Seventh Amendment. *Kennon v. Gilmer*, 131 U.S. 22 (1889); 6A Moore's Federal Practice ¶59.05[3] at 59-61 (2d ed. 1979). This is not a case, such as *Garfield Aniline Works v. Zendle*, 43 F.2d 537, 538 (3d Cir. 1930), in which the amount of damage is a matter of undisputed calculation. Thus the court's decision to set aside the verdict and enter judgment for one dollar cannot stand.

Moreover, we have serious questions about the court's view of the evidence of damage. The court's charge properly instructed the jury that Scott could in a Section 1983 action recover for "any pain, suffering and mental anguish already suffered by him and proximately resulting from the injury in question." If the jury concluded, as apparently it did, that Scott had been confined unnecessarily in the harsh conditions of the Vroom Building, it certainly could infer that he suffered pain and mental anguish. *See, e.g., Buse v. Hudkins,* 584 F.2d 223 (7th Cir. 1978), *cert. denied,* 440 U.S. 916 (1979) (prisoner entitled to more than nominal damages in view of less desirable living conditions at prison than at farm); *Mack v. Johnson,* 430 F. Supp. 1139 (E.D. Pa. 1977), *aff'd* 582 F.2d 1275 (3d Cir. 1978) (prisoner confined in segregation cell for 30 days compensative for deprivation of exercise and presumed mental anguish); *Wright v. McMann,* 321 F. Supp. 127 (N.D. N.Y. 1970) *aff'd in relevant part,* 460 F.2d 126 (2d Cir. 1972) ($1500 award to compensate prisoner for being confined nude in isolation). Where the fact of injury appears but damages are not susceptible of mathematical calculation, the court should not ordinarily disturb the jury's evaluation of an appropriate compensatory award. *Chuy v. Phila. Eagles Football Club,* 595 F.2d 1265, 1279 n.19 (3d Cir. 1979).

We do note, however, that the court was requested by defendants to charge that Scott not be compensated for damages due to lack of treatment for periods during which he refused a particular form of treatment. See *Donaldson v. O'Connor,* 422 U.S. 563, 569 n.4 (1975). Although this failure to charge might not, alone, have warranted a new trial, the court will have an opportunity to consider this request more carefully on remand. Moreover,

the court was requested to charge that damages could be awarded only for the period within the statute of limitations. The failure to give such a charge permitted the jury to assess damages from the time the plaintiff was first confined in 1954. We find no express ruling on this request and since it was not briefed, we do not pass on its merits. *See generally Rosenau v. City of New Brunswick*, 51 N.J. 130, 238 A.2d 169 (1968); *Stanley Development Co. v. Millburn Tp.*, 26 N.J. Super. 328, 97 A.2d 743 (1954); *cf. Stuebig v. Hammel*, 446 F. Supp. 31 (M.D. Pa. 1977) (Pennsylvania law).

VIII.

One remaining issue, not raised in Scott's brief, must, because of our disposition of this appeal, be adverted to. At the end of the plaintiff's case the court dismissed the State of New Jersey as a defendant. At that time the court did not have the benefit of the Supreme Court's opinions in *Maine v. Thiboutot*, 48 U.S.L.W. 4859 (U.S. June 25, 1980) and *Maher v. Gagne*, 48 U.S.L.W. 4891 (U.S. June 25, 1980). In remanding the case, however, we note the likelihood, if not the certainty, that Scott will apply for an award of attorney's fees pursuant to 42 U.S.C. §1988, thus directly implicating *Maher*. To avoid prolonging this protracted litigation any more than necessary, we believe it appropriate to point out, in light of the recent Supreme Court rulings and the facts of this case, that the State's presence as a defendant for purposes of awarding such counsel fees may be important. The judgment is not yet final. On remand, therefore, the court below may upon proper motion by the plaintiff reconsider its judgment dismissing the State as a party and determine whether it is an appropriate defendant against which an award of attor-

ney's fees might be made insofar as prospective injunctive relief is to be granted against the individual defendants in their official capacity.

IX.

The judgment in defendants' favor on Scott's claims for prospective relief will be vacated and the case remanded for consideration of specific equitable relief in light of Scott's right to be given adequate treatment and have his assignment to other less restrictive settings within Trenton Psychiatric Hospital carefully considered. With respect to the liability of the individual defendants for compensatory and punitive damages, the judgments below are vacated and the case remanded with direction to grant a new trial on these issues in light of this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1429

In the Supreme Court of the United States

October Term, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,
Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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Petition for Certiorari Filed February 23, 1981
Certiorari Granted May 18, 1981

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JOINT APPENDIX

I.

RELEVANT DOCKET ENTRIES (DISTRICT COURT)

1976

Nov. 4 Complaint filed.

Nov. 4 Jury trial demand, filed.

* * *

1977

Jan. 17 Defts'. motion to dismiss, notice of motion and certification of service, filed.

* * *

Jan. 25 Amended complaint, filed.

Feb. 16 Defts'. motion to dismiss amended complaint, filed.

* * *

June 7 Memorand re: Motion to dismiss, McGlynn, J., filed. entr. & cys. mailed 6/8/77

June 7 Order dtd. 6/6/77 that defts'. motion to dismiss be and the same is hereby GRANTED to the extent that plff. seeks damages from them in their official capacities, and it is further order that defts' motion to dismiss in all other respects is hereby DENIED, filed. JM entr. & cys. mailed 6/8/77

June 22 Answer filed.

June 22 CASE LISTED FOR TRIAL

* * *

Oct. 18 Pretrial memorandum order to complete discovery by 12/29/77, etc and listing case of Feb. 1978 trial list, filed. JM cys. mailed 10/18/77-entr. 10/19/77

* * *

Nov. 10 Plffs motion for leave to file second amended complaint, notice, memorandum of law, filed.

Nov. 14 Defts' response to plff's motion for leave to file a second amended complaint, filed.

* * *

Dec. 8 Order dd. 12/7/77 that plff's motion for leave to amend his complaint is granted, & plff's Second Amended Complaint is deemed filed as of this date. It is further Ordered that defts shall answer plff's Second Amended Complaint within 20 days, filed. (12/9/77 entered & copies mailed.)

Dec. 8 Plff's Second Amended Complaint, filed.

* * *

Dec. 30 Defts' Youngberg, Matthews and Conley answers to plff's second amended complaint, filed.

* * *

1978

Feb. 9 Plff's motion for preliminary injunction, Memorandum of Law & Notice filed.

* * *

Feb. 10 Defts' response to plff's motion for a preliminary injunction, filed.

* * *

Apr. 17 Defts' motion for leave to file an amended answer & Certificate, filed.

* * *

Apr. 21 JURORS Called & Sworn, Trial on 4/17/78, Plffs' witnesses-sworn, filed.

* * *

Apr. 24 Defts' 2nd amended answer to plff's 2nd amended complaint, filed.

* * *

Apr. 27 Defts' motion for directed verdict pursuant to F.R.C.P. 50, filed.

Apr. 27 Trial resumes on 4/26/78; The Court charges the jury; Verdict—in favor of all defts', filed.

* * *

Apr. 27 Order dated 4/26/78 that judgment is entered in favor of Defts' and against plffs', filed. 4/28/78 entered & copies mailed. JM/Clk

* * *

May 25 Plff's notice of appeal received 5/25/78 at 4:00 PM, filed. 5/26/78 entered & copies mailed to McGuire; Frank, Margolis, Edelstein & Scherlis.

May 25 Copy of Clerk's notice to USCA, filed.

* * *

June 31 Certified copy of Order received from the U.S.C.A. that appellant's motion to proceed on appeal in forma pauperis etc. is GRANTED, filed.

II.

RELEVANT DOCKET ENTRIES (COURT OF APPEALS)

1978

July 28 Order (*Adams*, Weis and Higginbotham, C.J.) granting appellant's motion for leave to proceed in forma pauperis, filed.

* * *

July 28 Order (Acting Clerk) directing that the appeal be docketed and the record filed out of time, as of the date of this order, filed.

* * *

Sept. 6 Brief for appellants, filed. (4 cc.)

* * *

Oct. 10 Brief for appellees, filed. (25 cc.). Certificate of service by hand delivery on October 10, 1978 appears on last page of brief.

* * *

1979

Jan. 2 Order dated December 29, 1978 (Seitz, Ch.J.) directing 20 minutes argument time for each side, filed.

Jan. 9 Argued. Coram: Seitz, Ch.J., Gibbons and Higginbotham, C.J.

Dec. 21 Order (*Seitz*, Ch.J., Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, Higginbotham & Sloviter, C.J.) directing that the Clerk of this Court list

this case for rehearing before the court in banc at the convenience of the Court filed.

1980

April 21 Clerk's letter to counsel, written at the direction of the Court, requesting counsel be prepared to address at oral argument the question, *inter alia,* whether Mr. Romeo was involuntarily committed., etc. (see letter for rest of the question).

March 11 Order (Seitz, Ch.J.) directing 15 minutes reargument time for each side, filed.

April 28 Reargued. Coram: Seitz, Ch.J., Aldisert, Adams, Gibbons, Rosenn,Weis, Garth, Higginbotham & Sloviter, C.J.

Nov. 24 Opinion of the Court (Seitz, Ch.J.), Aldisert, *Adams,* Gibbons, Rosenn, Weis, Garth Higginbotham & Sloviter, C.J.), together with separate concurring opinion by Chief Judge Seitz, with whom Judges Aldisert, Rosenn & Garth join, and separate concurring opinion by Judge Aldisert, with whom Judge Garth joins; and separate concurring opinion by Judge Garth, with whom Judge Aldisert joins, filed.

Nov. 24 Judgment on rehearing vacating the judgment of the District Court, entered April 28, 1978; and remanding the cause for a new trial in accordance with the opinion of this Court, filed.

Dec. 16 Certified judgment in lieu of formal mandate issued.

* * *

Dec. 12 Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Rosenn, Weis, Garth, Higginbotham & Sloviter, C.J.) amending the opinion, filed.

III.

SECOND AMENDED ANSWER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO, an incompetent, by his mother and next friend, PAULA ROMEO,

Plaintiff

vs.

DUANE YOUNGBERG, individually and in his official capacity as Superintendent, Pennhurst State School and Hospital,

and

RICHARD MATTHEW, individually and in his official capacity as Director of Resident Life, Pennhurst State School and Hospital,

and

MARGUERITE CONLEY, individually and in her official capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Defendants

DEFENDANTS' SECOND AMENDED ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

FIRST DEFENSE

Defendants Youngberg, Matthew and Conley answer plaintiff's Second Amended Complaint as follows:

1. Paragraph 1 is admitted only insofar as it purports to characterize the form of this action. All factual allegations are denied.

2. Paragraph 2 consists of a legal conclusion to which no response is required. To the extent that it is deemed to contain factual allegations, they are denied.

3. Admitted.

4. Paragraph 4 is admitted except insofar that it is denied that defendant Youngberg is responsible for the acts or omissions of any person employed at Pennhurst.

5. Paragraph 5 is admitted to the extent that Richard Matthew is the Director of resident life at Pennhurst. It is denied to the extent that it alleges that he has day-to-day responsibility for the health and welfare of patients or residents allegedly incarcerated at Pennhurst and to the extent that it alleges that Nicholas Romeo was at any time or is now incarcerated at Pennhurst.

6. Paragraph 6 is admitted to the extent that it alleges that defendant Conley is the Unit Director of Unit 9 at Pennhurst. All other allegations of this paragraph are denied including any allegations that Nicholas Romeo was at any time or is now confined in Unit 9 at Pennhurst.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted except that it is denied that defendants have held or are now holding plaintiff in Pennhurst against his will.

9. After reasonable investigation, defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 9. Strict proof of these averments are demanded at trial.

10. Paragraph ten is denied insofar as it alleges that as a result of attacks on him by third persons, the plaintiff suffered a permanently deformed finger, a broken bone or bones, hepatitis or boils. With respect to other injuries alleged in paragraph 9, defendants are without knowledge or information sufficient to form a belief as to the truth of this paragraph or that such injuries were caused by attacks on plaintiff by third persons. Strict proof of these averments is demanded at trial.

11. Denied.

12. Denied.

13. Denied. It is denied that defendants refused to provide plaintiff with such care and attention as would reasonably prevent him from incurring attacks and beatings. It is further denied that plaintiff suffered or was injured by alleged attacks and beatings. It is further denied that defendants' conduct constituted an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments of the United States Constitution.

14-19. Paragraphs 14 through 19 are specifically denied.

20. Paragraph 20 is denied insofar as it alleges that defendants caused plaintiff to be transferred to the medical-

surgical building at Pennhurst subsequent to the filing of plaintiff's Complaint in this case.

21. Denied.

22. Admitted.

23-24. Paragraph 23 and 24 are specifically denied.

25. Paragraph 25 consists of a legal conclusion to which no response is required. To the extent that it is deemed to contain factual allegations, they are specifically denied.

26. Insofar as this paragraph alleges that Woodhaven Center has appropriate vacancies and could provide plaintiff with treatment and program, it is specifically denied. To the extent that the availability of such treatments or programs is alleged in other unnamed and unspecified state facilities, defendants are without knowledge or information after reasonable investigation sufficient to form a belief as to the truth of the averments of this paragraph. Strict proof thereof is demanded at the time of trial.

27. Paragraph 27 is denied.

28. Paragraph 28 is denied. It is further denied that Pennhurst employees or other unidentified or unnamed mental retardation professionals have made recommendations and/or requests that defendants seek plaintiff's transfer to another state facility.

29. Paragraph 29 consists of a legal conclusion to which no response is required. To the extent that this paragraph is deemed to contain factual allegations, they are specifically denied.

30. Paragraph 30 is denied. It is further denied that defendants have unconstitutionaly deprived plaintiff of any rights. To the extent that this paragraph alleges the existence of a right to transfer to another State institution or to the extent that it alleges that defendants owe plaintiffs the duty to seek such a transfer, this paragraph consists of a legal conclusion to which no response is required. To the extent such allegations of the existence of such a duty are deemed to be factual, the existence of such duty is denied.

31. Denied.

SECOND DEFENSE

32. This action is barred by that Statute of Limitations.

THIRD DEFENSE

33. The Second Amended Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

34. At all times relevant to this action, defendants acted in their official capacities and the doctrine of official immunity bars this action.

FIFTH DEFENSE

35. At all times relevant to this action, defendants acted in good faith and reasonably, in light of all the circumstances, according to state and federal law, and at no time knew or should have known that their actions or alleged omissions to act may have violated any right of plaintiff. Nor have defendants acted with the malicious

intent to violate plaintiff's rights or to injure him in any way. Accordingly, defendants are entitled to immunity from damages.

SIXTH DEFENSE

36. Plaintiff's representative Paul Romeo has refused to allow defendants to adopt measures which, in their professional judgment, would have substantially improved Nicholas Romeo's physical safety.

SEVENTH DEFENSE

37. Defendants' alleged failure to adopt such policies and procedures as would have been required to assure plaintiff a reasonable degree of physical safety was neither intentional, knowing or malicious.

EIGHTH DEFENSE

38. At all times relevant to this action, defendants have provided for the reasonable physical safety of plaintiff Nicholas Romeo.

NINTH DEFENSE

39. This action is barred by the final judgment in *Halderman v. Pennhurst,* Civil Action No. 74-1345 (E.D. Pa. opinion filed December 23, 1977), as between plaintiff Nicholas Romeo, a member of the plaintiff class therein, and defendant C. Duane Youngberg and those in privity with him.

TENTH DEFENSE

40. This action is barred by the Eleventh Amendment of the United States Constitution.

ELEVENTH DEFENSE

41. This Court lacks jurisdiction over this action.

TWELFTH DEFENSE

42. At no time relevant to this litigation has plaintiff Nicholas Romeo or his representative ever requested nor have defendants at any time refused to release Nicholas Romeo from Pennhurst or from any part of Pennhurst or to transfer him to any specifically designated ward at Pennhurst.

THIRTEENTH DEFENSE

43. Plaintiff Nicholas Romeo has at no time relevant to this litigation been confined by defendants against his will, nor have defendants opposed his release from Pennhurst.

FOURTEENTH DEFENSE

44. This suit is barred by reason of laches. Plaintiff is estopped to allege that the alleged acts or omissions of defendants constitute or constituted an infringement of plaintiff's alleged rights.

Joseph W. McGuire
Deputy Attorney General
J. Justin Blewitt, Jr.,
Deputy Attorney General, Chief, Civil Litigation
Robert P. Kane,
Attorney General
Frank, Margolis, Edelstein & Scherlis

By: Jonathan Wheeler

IV.

EXHIBITS

PLAINTIFF'S EXHIBIT NO. 16

PENNSYLVANIA HOSPITAL

Department
for Sick and Injured

The Nation's First Hospital—Founded 1751
Eighth and Spruce Streets

Philadelphia, Pa. 19107
Telephone 215—829-5281

April 21, 1976

C. Duane Youngberg, Ed. D.
Superintendent
Pennhurst State School and Hospital
Spring City, Pa. 19475

Re: Nicholas Romeo

Unit IX

Dear Superintendent Youngberg:

Mrs. Paula Romeo has expressed serious concern to us regarding an incident involving her son, Nicholas, which occurred on March 20, 1976. Mrs. Romeo received a letter from Dr. Bewint on March 22nd informing her that Nicholas had incurred a "laceration of his left fifth finger"

and had been admitted to the hospital. She found out later, after repeated phone calls, that his finger was not only lacerated but fractured as well. She is concerned both about the fact that the incident occurred and the discrepancy in the information she received. She also feels that there is insufficient staff to adequately supervise the patients on that ward.

This is the second time we are writing to express our serious concern, as well as Mrs. Romeo's, about the health and welfare of Nicholas. (You will find a copy of the December 5, 1975 letter enclosed). We are requesting, on Mrs. Romeo's behalf, a report from you regarding the above reported incident at your earliest convenience.

Very truly yours,

Enclosure

(s) Marianne Trainer
Mrs. Marianne Trainer, MSW
Developmental Disabilities Unit
Hall Mercer CMH/MR Center

Youngberg
D-9
12-29-77

cc: Russell Rice
PARC
Mrs. Romeo
MT: dat

PLAINTIFF'S EXHIBIT NO. 17

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1 of 26
CC: Zelt Cooper
Joan Claypoole
Joe Foster
Dick Matthew
Marge Conley
Supt File (2)

October 22, 1976

The Honorable Michael O. Myers
House of Representatives
Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Mr. Myers:

This is in response to your letter to me of September 28, 1976, concerning Mr. Nicholas Romeo, a resident of Pennhurst Center.

In response to your request we have directed Pennhurst Center to contact Mrs. Romeo to explain the procedures involved in applying for a transfer for her son and to facilitate, to the extent possible, the transfer. For your information, a transfer to Woodhaven Center is contingent upon the availability of space and upon the suitability of the programs provided at the Center.

We appreciate your continued concern for the well-being of Nicholas. If we may be of further assistance, please contact us.

Very truly yours,
Frank S. Beal

EBC:jh
cc: Secretary's Office
Mr. Coluarti
Mr. Hobbs
Dr. Rice
Dr. Youngberg
Ms. Marshall
Mr. Carskadon

DEFENDANTS' EXHIBIT NO. 4
(PETITION FOR COMMITMENT OF NICHOLAS ROMEO)

IN THE COURT OF ..... OF ..... COUNTY

..... TERM, 19 .....

..... NO. .....

PETITION FOR COMMITMENT FOR PERSON WHO IS MENTALLY DISABLED

MENTAL HEALTH AND MENTAL RETARDATION ACT OF 1966

(Sections 406, 407, 408, 410, 411 and 413)

To the Honorable the Judges of the Above Court

The Petition of (Name of Petitioner) Paula Romeo respectfully represents:

That she is the (Relationship or Title of Petitioner as Prescribed) Mother of (Name of Patient) Nicholas Romeo

TYPE OF COMMITMENT

[×] Civil Court Commitment (complete Parts I, III, IV, V, VII, IX, X, and if possible, VI)

— Commitment of person charged with crime and released on bail (Complete Parts I, III, IV, V, VII, IX)

— Commitment of person charged with crime and detained in a penal or correctional institution (Complete Parts II, III, IV, VIII, IX)

— Commitment in lieu of sentence of person adjudged guilty of crime (Complete Parts III, VII, IX)

— Commitment of person undergoing sentence and detained in penal or correctional institution (Complete Parts II, III, IV, VIII, IX)

— Commitment of person acquitted of crime because of insanity (Complete Parts I, III, IV, V, VII, IX)

Note: Part X must also be completed where applicable if patient is retarded.

PART I (UNDER PROVISIONS OF SECTIONS 406, 407 AND 413)

That your Petitioner believes that (Name of Patient) Nicholas Romeo is mentally disabled because (State Reason) "Since my husband's death (May 10'74) I am unable to handle him. He becomes violent--Kicks, punches, breaks glass; He can't speak—wants to express himself but can't. He is constant 24 hr. care. without my husband I am unable to care for him."

Check Applicable Paragraph

[×] Attached are the certificates of a physician or physicians to the effect that the patient is mentally disabled.

☐ Certificates of a physician or physicians are not attached because:

The Court upon consideration of such petition shall: Issue a warrant requiring that such person be brought before the Court: Fix a date for hearing which shall be as soon as the warrant is executed, and notify the parties in interest. Wherefore Section 406(4) of the Mental Health and Mental Retardation Act of 1966 empowers the court to order an inquiry into the patients condition.

PART II (UNDER PROVISIONS OF SECTIONS 408 AND 411)

That the Defendant, a prisoner in institution was charged or convicted of the following (Specify Charges of the Crime for which convicted)

That your Petitioner believes that the Defendant is in such condition as to make it necessary that he be cared for in a mental facility. Wherefore Section 408(s) of the Mental Health and Mental Retardation Act of 1966 empowers the court to order an inquiry into the Defendants condition.

(s) Paula Romeo
Signature of Petitioner

To Be Completed By Facility

Name of Facility Penna. Hosp.; Admission Date 5/22/74;

Case Number

PART III PERSONAL DATA

Patient's Name (Last, First, Middle): Romeo Nicholas; Maiden Name ; Aliases ; Social Security No: 173-52-0756

Address (Street, Town, State): 1136 McKean St., County Phila., BSU

Sex [×] Male,—☐ Female. Age of Admission: 26; Date of Birth, Month 1, Day 4, Year 48; Education (Enter Highest Grade Completed Inc. College & Advanced Study

Marital Status: ☐ Married, ☐ Widowed, ☐ Divorced, ☐ Separated, [×] Never Married; Occupation: None.

Income (Total Gross Annual Family Income To Nearest Thousand Dollars) $0; Number of Persons Dependent on Income: 0

Previous Psychiatric Service: ☐ None; ☐ Pa. State Mental Hosp. (24 hr. care); ☐ Private Mental Hospital; ☐ VA Hospital; ☐ Pa. State Mental Retardation Facility; ☐ Psychiatric Unit General Hosp.; ☐Other Inpatient Care; ☐ Psychiatric Day-Night Care; ☐ Private Mental Retardation Facility; ☐ Private Psychiatrist; ☐ Outpatient Clinic; ☐ Other Outpatient.

If patient recently received treatment from an above noted facility and/or physician, please enter name(s)

Name, Address and Relationship of Responsible Relative: Paula Romeo, Mother, 1136 McKean St., Phila Pa., Telephone No. H03-1181 Alternate No.

PART IV

AFFIDAVIT

This affidavit must be sworn to or affirmed before a person authorized to administer oaths.

State of
County of ss

_____ Being duly sworn/affirmed according to law doth depose and say that the facts set forth in the above application are true to the best of his knowledge and belief.

Sworn affirmed to and subscribed before me this day of A.D. 19 (s) Paula Romeo
Signature of Petitioner

I certify that the signature to the foregoing petition is genuine

(s) Wilma C. Crane

Signature of Person Administering Oath

WILMA C. CRANE

Notary Public, Philadelphia, Philadelphia Co.

My Commission Expires March 28, 1977

Sworn to and subscribed before me this 28th day of May 1974.

PART V

CERTIFICATE OF PHYSICIAN

If Patient is Mentally ill—Commitment MUST be made within thirty (30) days of the first certifying examination.

If Patient is Mentally Retarded—Commitment MUST be made within three (3) months of the first certifying examination.

Name of Patient: Nicholas Romeo, Address of Patient, 1136 McKean St., Date of Examination: 5-28-74

History of illness as given by applicant and other relevant information including report of psychologist if patient is mentally retarded (Form is attached for Report of

Psychologist): 26 year old mentally retarded man become a management problem at home approx. 10 days after his father's death. He began to strike his mother. Must be fed and requires constant care.

Physical and mental findings at time of examination: Pt. is nonverbal-restrained in bed. Recognizes examiner by rolling his eyes and banging his head against bedrail. Pt. is easily excitable and profoundly retarded.

I certify that I am licensed to practice Medicine or Osteopathy in Pennsylvania and that I have examined the patient with care and diligence within one week prior to the date of this certification in my opinion the patient is: ☐ Mentally Ill, [×] Mentally Retarded, ☐ Not Mentally Disabled.

[Signature illegible] M.D. or D.O.
Signature of Physician
Penna. Hosp.
Address of Physician

Date 5-28-74

AFFIDAVIT

This affidavit must be sworn to or affirmed before a person authorized to administer oaths.

State of
County of ss

_____ Being duly sworn/affirmed according to law doth depose and say that the facts set forth in the above application are true to the best of his knowledge and belief.

Sworn/affirmed to and subscribed before me this
day of A.D. 19 [Signature illegible]
Signature of Physician

I certify that the signature to the foregoing petition is genuine

(s) Wilma C. Crane
Signature of Person Administering Oath

Sworn to and subscribed before me this 28th day of May 1974.

WILMA C. CRANE

Notary Public, Philadelphia, Philadelphia Co.

My Commission Expires March 28, 1977.

Department of Public Welfare

PART VI

CERTIFICATE OF PHYSICIAN

If Patient is Mentally ill—Commitment MUST be made within thirty (30) days of the first certifying examination.

If Patient is Mentally Retarded—Commitment MUST be made within three (3) months of the first certifying examination.

Name of Patient Date of Examination

Address of Patient

History of illness as given by applicant and other relevant information including report of psychologist if patient is mentally retarded (Form is attached for Report of Psychologist)

_____

_____

_____

_____

_____

Physical and mental findings at time of examination

_____

_____

_____

_____

_____

I certify that I am licensed to practice medicine or osteopathy in Pennsylvania and that I have examined the patient with care and diligence within one week prior to the date of this certification

In my opinion the patient is:

☐ Mentally ill

☐ Mentally retarded

☐ Not mentally disabled

_____ M.D. or D.O.

Signature of Physician

_____

Address of Physician

Date _____

AFFIDAVIT

This affidavit must be sworn to or affirmed before a person authorized to administer oaths.

State of
County of ss

———— Being duly sworn/affirmed according to law doth depose and say that the facts set forth in the above application are true to the best of his knowledge and belief.

Sworn/affirmed to and subscribed before me this day of A.D. 19

Signature of Physician

I certify that the signature to the foregoing petition is genuine

———————

Signature of Person Administering Oath

———

ORDER FOR EXAMINATION

This day of 19 after hearing the foregoing petition for commitment of (Name of Patient) represented by (Name of Attorney) the Court directs.

PART VII (UNDER SECTIONS 405, 407, 410 AND 413)

Check applicable paragraph and attach report

☐ Examination and report by two licensed physicians

(Name of Physician)

(Name of Physician)

☐ Commitment to a facility for a period not exceeding ten days or in the case of a person convicted of a crime not to exceed 60 days.

PART VIII (UNDER SECTIONS 408 AND 411)

Check applicable paragraph

Check one or any combination of the following procedures:

☐ Examination and report by two licensed physicians

(Name of Physician)

(Name of Physician)

☐ Examination and report by a commission

(Name of Physician)

(Name of Physician)

(Name of Attorney)

☐ Commitment to a facility not exceeding 60 days for further examination at request of appointed physician under Section 408 (c).

BY THE COURT:

J.

PART IX

IN THE COURT OF ..... OF .....COUNTY
Commonwealth

vs.

.....TERM, 19

..... NO. .....

ORDER FOR COMMITMENT

This day of 19
after hearing and consideration of

(Reports, Testimony, Etc. Attached)

the court finds

(Patient's Name)

☐ Mentally ill ☐ Mentally retarded

Accordingly the court directs that

(Patient's Name)

be committed to for:

(Name of Facility)

☐ Inpatient Care

☐ Partial Hospitalization (Not applicable under Sections 408, 410 and 411)

☐ Outpatient Care (Not applicable under Sections 408, 410 and 411)

As a mentally disabled person pursuant to the provisions of Section of the Mental Health and Mental Retardation Act of 1966.

For a period not to exceed

Check applicable paragraph

☐ Sections 407 and 408 until patient has improved sufficiently to enable him to participate intelligently in his own defense

☐ Sections 410, 411 and 412 maximum sentence authorized by law

(Insert Period)

BY THE COURT

MH/MR 2-3/71

PART X

REPORT OF PSYCHOLOGIST

Patient's Name, Nicholas Romeo; Birthdate, 1-4-48, Date of Examination, 5-29-74.

Address, 1136 McKean Street.

Background Information

Maturation (Significant lag in growth and development): Since birth, development has been slow in all maturational areas. ☐ over

Social Adjustment: Social adjustment is on a low level as Nicholas is capable of responding only to the simplest environmental stimuli (his name, a smile) and interpersonal relationships. He is dependent on others for his maintenance and completion of daily tasks. ☐ over

Tests Administered

Names of Tests and Results: Vineland Social Maturity Scale completed by Ms. Romeo. Formal testing was impossible as Nicholas was in restraints. Social maturity is approximately at a two year old level. He is able to walk steps, get a drink. However, the patient has no feeding, dressing, or washing skills.

Diagnosis (AAMD Classification): 314.2 Profound Mental Retardation due to Phenylketonuria.

Record the person's level of development for each of the following:

Attribute	Severely Sub-Average	Moderately Sub-Average	Mildly Sub-Average	Average	Above Average
1. Self-Help Skills	X				
2. Attentional Development	X				
3. Perceptual Functioning	X				
4. Psychomotor Functioning		X			
5. Communication Skills	X				
6. Concrete Cognitive Functioning	X				
7. Abstract Cognitive Functioning	X				
8. Vocational Functioning	X				
9. Personality Integration	X				☐ over

[Notarial Seal]

Adrienne Warner Med.
Psychologist

Hall-Mercer CMH/MR Center

Address or Agency

Defendants' Exhibit No. 4

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

June Term, 1974

No. 1027

IN RE: NICHOLAS ROMEO

ORDER FOR INTERIM COMMITMENT

This 11th Day of June 1974 Upon Consideration of Dr. Richard Limoges—Adrienne Warner, The MASTER Finds NICHOLAS ROMEO

☐ MENTALLY ILL

[×] MENTALLY RETARDED

Accordingly The MASTER Directs That NICHOLAS ROMEO Be Committed To Pennhurst State School & Hospital

FOR:

[×] INPATIENT CARE

☐ PARTIAL HOSPITALIZATION (Not applicable under Sections 408, 410 and 411)

☐ OUTPATIENT CARE (Not applicable under Sections 408, 410 and 411)

☐ EXAMINATION AND EVALUATION—RESCHEDULE ———————

AS A MENTALLY DISABLED PERSON FOR A PERIOD NOT TO EXCEED ——— PURSUANT TO THE PROVISIONS OF SECTION 406 OF THE MENTAL HEALTH AND MENTAL RETARDATION ACT OF 1966.

BY THE MASTER
(s) C. C. Barrie

This Interim Order for Commitment to be confirmed by an ORDER executed by the COURT within forty-eight (48) 96 Hours.

NO OBJECTIONS:

_____

Attorney for Respondent

_____

10,434
[Illegible Notation]

PART IX

9

THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
June Term, 1974
No. 1027

Commonwealth

vs.

Nicholas Romeo

ORDER FOR COMMITMENT

This 11th day of June 1974 [In] consideration of DR. RICHARD LIMOGES (Reports, Testimony, Etc. Attached) court finds NICHOLAS ROMEO

☐ Mentally Ill
[×] Mentally Retarded

Accordingly the Court Directs That NICHOLAS ROMEO (Patient's Name) [be] committed to PENNHURST STATE SCHOOL & HOSPITAL (Name of Facility) for:

☐ Inpatient Care

☐ Partial Hospitalization (Not applicable under Sections 408, 410 and 411)

☐ Outpatient Care (Not applicable under Sections 408, 410 and 411)

[for] mentally disabled person for a period not to exceed (If Designated Period Required)

[pur]suant to the Provisions of Section 406 of the Mental Health and Mental Retardation Act of 1966.

BY THE COURT
Hirsh
J.

10,434

DEFENDANTS' EXHIBIT NO. 6

(ORDER FOR COMMITMENT OF NICHOLAS ROMEO)

[Illegible Notation]
9

PART IX

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

June Term, 1974

No. 1027

Commonwealth

vs.

Nicholas Romeo

ORDER FOR COMMITMENT

This 11th Day of June 1974 [In] Consideration of DR. RICHARD LIMOGES (Reports, Testimony, Etc. Attached) Court Finds NICHOLAS ROMEO

☐ Mentally Ill

[×] Mentally Retarded

Accordingly the court directs that NICHOLAS ROMEO (Patient's Name) [be] committed to PENNHURST STATE SCHOOL & HOSPITAL (Name of Facility) For:

☐ Inpatient Care

☐ Partial Hospitalization (Not applicable under Sections 408, 410 and 411)

☐ Outpatient Care (Not applicable under Sections 408, 410 and 411)

[for] mentally disabled person for a period not to exceed (If Designated Period Required)

[pur]suant to the Provisions of Section 406 of the Mental Health and Mental Retardation Act of 1966.

BY THE COURT
Hirsh
J.

V.

DEFENDANTS' REQUESTS

IN THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

Nicholas Romeo,

Plaintiff

v.

Duane Youngberg, et al.,

Defendants

DEFENDANTS' REQUESTED JURY INSTRUCTIONS

Defendants hereby request that the following instructions be given to the Jury. The requested instructions are attached hereto. Defendants request the Court's leave to supplement this request as justice may require.

(s) Joseph W. McGuire
Joseph W. McGuire
Deputy Attorney General
Jonathan Wheeler, Esquire
Attorneys for Defendants

Defendants' Jury Instruction No. 1:

Our constitution guarantees all of us the right not to be deprived of our liberty without due process of law. In evaluating the evidence in this case, you are entitled to presume that all citizens including the defendants fully obey the law until the evidence has convinced you otherwise.

Authority: Fourteenth Amendment, U.S. Constitution

Defendants' Jury Instruction No. 2:

All testimony of an admitted perjurer shall always be considered with caution and weighed with great care.

Authority: III Wigmore, *Evidence* §959 (3d Edition 1940)

Defendants' Jury Instruction No. 3:

A witness may be discredited or impeached by contradictory evidence, or by evidence that at some other time he or she had said or done something, or had failed to do or say something which is inconsistent with the witness' present testimony. If you believe any witness had been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

Authority: III Wigmore, *Evidence* §1008 (3d Edition 1940)

Defendants' Jury Instruction No. 4:

Evidence as to any oral admissions claimed to have been made outside the court by any party should be considered with caution and weighed with great care. The person making such an admission might have been mis-

taken or might not have clearly expressed his or her meaning. By the same token, the witness testifying to his or her alleged admission may have misunderstood or may have misquoted what was actually said. However, when an oral admission made outside the court is proved by the evidence, such an admission may be treated as trustworthy and should be considered along with all other evidence in the case.

Authority: IV Wigmore, *Evidence* §1056 (3d Cir. 1940)

Defendants' Jury Instruction No. 5:

Each party has introduced into evidence certain Interrogatories, which are questions together with answers signed and sworn to by the other party. A party is bound by his or her sworn answers. By introducing an opposing party's answers to Interrogatories, however, a party does not bind himself to these answers and he may challenge them in whole or in part or may offer contrary evidence.

Authority: Rule 33, Federal Rules of Civil Procedure

Defendants' Jury Instruction No. 6:

Damages must be reasonable. If you should find that the plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury and damage as you find, from a preponderance of the evidence in the case, that he has sustained as a proximate result of defendants' conduct. You are not permitted to award speculative damages. Consequently, you may not include in any verdict compensation for any prospective loss, although possible, if not reasonably certain to occur in the future.

Defendants' Jury Instruction No. 7:

With respect to plaintiff's claim for money damages you must return a verdict for the defendants unless each of them had acted with such impermissible motivation or with such disregard for the plaintiff's clear established constitutional rights that his or her actions could not reasonably be characterized as being in good faith.

Authority: *Hendricks v. McCune*, 434 F. Supp. 1038 (E.D. Va. quoting *Wood v. Strickland*, 420 U.S. 308, 322 1975)

Defendants' Jury Instruction No. 8:

In considering any potential liability of the defendants, you must take into account that under the law, the defendants are not liable to plaintiff for his emotional distress.

Authority: *Brainerd v. Potratz*, 421 S. Supp. 836; *Dear v. Rathje*, 391 F. Supp. 1, 9 (N.D. Il. 1975); *Robinson v. McCorkle*, 462 F.2d 111 (3d Cir. 1972)

Defendants' Jury Instruction No. 9:

Even though there are three defendants in this action, it does not flow from that fact alone that if one is liable all are liable. Each defendant is entitled to a fair consideration of his case and should not be prejudiced by your possible finding against another. If you find, based on the evidence, that Nicholas Romeo's civil rights were violated, you must determine if each of the defendants violated Romeo's civil rights. If you conclude that any defendant violated Nicholas Romeo's rights, that alone does not mean that the two others are also liable.

Defendants' Jury Instruction No. 10:

If you find that the plaintiff is entitled to a verdict in accordance with these instructions, but do not find that he has sustained substantial actual damages, you may return a verdict for the plaintiff in the nominal sum of $1.00.

Defendants' Jury Instruction No. 11:

The burden is on the plaintiff in a civil action such as this to prove the necessary elements of his claim by a preponderance of the evidence. If he fails to establish any essential element of his claim by a preponderance of the evidence, you should find for the defendant.

Establishing something by a preponderance of the evidence means proving that something is more likely so than not so. In other words, a preponderance of the evidence in this case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your mind the belief that what is sought to be proved is more likely to be true than not true.

In making your determination as to whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, unless instructed otherwise, regardless of which party called them and any exhibits received in evidence regardless of who produced them.

Authority: *Porter v. Atlantic and Gulf Stevedores, Inc.*, 387 F.2d 409 (3d Cir. 1968)

Defendants' Jury Instruction No. 12:

In evaluating the evidence and in determining whether any of the defendants have violated Nicholas Romeo's

civil rights, the fact that Nicholas Romeo was injured on any occasion, regardless of how many times he was injured, does not means that the defendants caused that injury or that they violated his civil rights.

Defendants' Jury Instruction No. 13:

The mere fact that Nicholas Romeo was injured on one or more occasions does not permit you to draw the inference that the injury or injuries were caused by any of the defendants or that any of the defendants was deliberately indifferent.

Defendants' Jury Instruction No. 14:

If you find, based on the evidence in this case, that Nicholas Romeo has been kept at Pennhurst by each of defendants against his will or against the will of his representative, Paula Romeo, he is entitled to some reasonable treatment with respect to his mental condition. However, if you find, based on the evidence, that Nicholas Romeo has not been confined at Pennhurst against his will or the will of his mother, none of the defendants owed plaintiff any constitutional duty to provide treatment.

In determining whether plaintiff has been confined against his or his mother's will, you may take into account any request that plaintiff or his representative made to any of the defendants to release Nicholas Romeo from Pennhurst.

Authority: *United States v. Jackson*, 553 F.2d 109 (D.C. Cir. 1976); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967)

Defendants' Jury Instruction No. 15:

In order to show that the treatment of Nicholas Romeo was adequate under the Constitution, the defend-

ants need not show that the treatment would cure or improve Nicholas' condition but only that they made a bona fide effort to do so. A treatment program, including treatment of the mentally retarded in residential groups, does not violate the Constitution merely because it has a negative therapeutic effect or because it has other undersirable side effects.

Authority: *U.S. v. Jackson*, 553 F.2d 109 (D.C. Cir. 1976); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967)

Defendants' Jury Instruction No. 16:

If based on the evidence in this case, you find that the defendants or any of them violated plaintiff's civil rights, you must then consider whether or not they are entitled to immunity because they acted in good faith. "Good faith" means a reasonable reliance on the existing procedures and a reasonable belief in their validity at the time. Immunity means that they are not liable, even if you have found that they have violated the plaintiff's civil rights.

Under the law, the defendants are entitled to immunity if (1) they did not know, nor should they have known, that the action which they took within the sphere of their official responsibility (2) would violate Nicholas Romeo's clearly established constitutional rights and (3) if they did not act with the malicious intent to cause the deprivation of his civil rights.

In making this determination, you must consider whether the state of the law at that time clearly established plaintiff's constitutional rights to be free from the actions of the defendants. The defendants are not lawyers

and have no duty to predict or anticipate changes in the law. If, the state of the law was in doubt, then you must find for the defendants.

Authority: *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) *U.S. ex rel. Bracey v. Rundel*, 368 F. Supp. 1186 (E.D. Pa. 1973)

Defendants' Jury Instruction No. 17:

In considering the evidence in this case, you must remember that a mentally retarded patient has the same constitutional rights as all citizens. Under the law, the defendants cannot be held liable for the deprivation of any of plaintiff's civil rights unless this deprivation was intentional. They cannot be held responsible for the act of their subordinates unless you conclude that: (1) each defendant had personal knowledge or reason to know that their subordinates were violating Nicholas Romeo's civil rights; (2) had authority and opportunity to intervene; (3) failed to do so. Your verdict must be in favor of defendants unless you find, based on the evidence, that they personally acted or failed to intervene so as to deny Nicholas Romeo's rights. However, if you find that the defendants did not personally act or fail to intervene resulting in a violation of Nicholas Romeo's constitutional rights, then even if some other person who was not a party violated plaintiff's rights, you must return a verdict for the defendants and against the plaintiff.

Authority: *Rizzo v. Goode*, 433 U.S. 362 (1976); *Lewis v. Hyland*, 534 F.2d 93 (3d Cir. 1977); *Flesch v. Eastern Pennsylvania Psychiatric Institute*, 434 F. Supp.

963, 979 (E.D. Pa. 1977); *Howell v. Cataldi*, 464 F.2d 272, 279 (3d Cir. 1972); *Halderman v. Pennhurst*, Civil Action No. 74-1345 (E.D. Pa. December 23, 1977)

Defendants' Jury Instruction No. 18:

You may not conclude that the defendants violated Nicholas Romeo's civil rights merely because you may conclude that Donnie James struck Nicholas Romeo in the shower.

VI.

COURT'S RULINGS ON POINTS FOR CHARGE

* * * *

(7-88)

THE COURT: Let's proceed to the points for charge. I will take the plaintiff's first.

No. 1 will be affirmed.

No. 2 is affirmed.

No. 3 is affirmed.

No. 4 is affirmed.

No. 5 is affirmed.

Some of these that I am affirming I may not use your language, but the points you raise will be covered.

No. 6 is affirmed.

No. 7 is affirmed.

No. 8 is affirmed.

No. 9 is affirmed.

No. 10 is affirmed.

No. 11 is affirmed.

No. 12 is affirmed.

(7-89) No. 13—

MR. McGUIRE: Your Honor, we object to this Charge.

THE COURT: It is not a violation of the Eighth Amendment to fail to provide plaintiff with treatment. It is a violation of the Eighth Amendment if there is a deliberate indifference to the serious medical and psychological needs of the patient.

I will make that modification in No. 13, if plaintiff will accept it.

I am talking about the second sentence.

MR. TRIYAK: The second sentence?

THE Court: Yes.

MR. TRIYAK: Would Your Honor have—

THE COURT: I am using the language of Estelle versus Gamble. It says if you find the defendants have failed to provide plaintiff with such treatment.

The Eighth Amendment does not require such treatment. The Eighth Amendment does require that you not be indifferent to the medical or psychological needs of the patient.

MR. McGUIRE: Your Honor, if I may speak further to this, if the Court intends to apply Estelle versus Gamble, I would say the first sentence of this charge is somewhat misleading.

It states there is a duty on the part of the de- (7-90)
fendants to provide this very kind of training.

It would seem to be contradictory to say in the first sentence the duty exists and in the second sentence to say it does not. Therefore, we would request the entire charge be thrown out.

Furthermore, the record is entirely clear the plaintiff is not being held against his will.

MR. TIRYAK: We are not going to argue the evidence at this time, it seems to me, Your Honor.

The purpose of the instruction has to do with the question of the purpose of commitment of a mentally-ill person.

As I stated before, he is not committed for any purpose other than to provide him treatment. He could not be involuntarily confined there at a mental institution for any other reason than to give him treatment. It has to do with his personal liberty, and that goes to the O'Connor versus Donaldson case, which the Supreme Court decided, and which the court said they could not keep a resident at a mental institution unless they provided him treatment.

MR. McGUIRE: Your Honor, the unrebutted evidence in this case—

MR. WHEELER: Your Honor, this request for charge goes much further. It says with such treatment as will afford him a reasonable opportunity.

That is directed to quality and kind of treat- (7-91)
ment. That is not what the Donaldson case says.

MR. TRIYAK: Your Honor, that language was taken from Judge Broderick's decision with respect to the duties owed by the officials at Pennhurst to the residents.

MR. McGUIRE: Your Honor, even if Judge Broderick's language is used, it is clear that language doesn't apply to the defendants in their individual capacities.

To be sure, Pennhurst may have that duty. However, Pennhurst is not on trial.

THE COURT: I think we have to try to zero in on these individual defendants, not the school itself.

MR. McGUIRE: These defendants, as individuals, owe nothing to Nicholas Romeo. Pennhurst owes a duty to him in some fashion.

Whether that duty is being carried out by Pennhurst, is not the subject of this litigation.

MR. ROMEO: Your Honor, the state has chosen these individuals.

THE COURT: The state is not a defendant here.

MR. TRIYAK: I understand that, but they have been delegated as state public officials.

THE COURT: Yes, but they are being sued in their individual capacity for violating the constitutional rights of this plaintiff.

MR. TRIYAK: That's correct, Your Honor.

(7-92) THE COURT: They are not being sued because they failed to give him care. They are being sued because they violated his constitutional rights.

MR. TRIYAK: Your Honor, if a police officer were to assault someone unjustifiably, one could recover damages against him under—

THE COURT: Individually. You can't recover against the City, though.

MR. TRIYAK: Correct, but even though he is acting as a public official, if you could show he was misusing the authority given to him—

THE COURT: Right, you have to show he was acting under color of law.

MR. TRIYAK: That's correct.

MR. McGUIRE: But, Your Honor, the distinction between that situation and the one before this Court is that it has already been conceded these defendants have done nothing personally to violate Nicholas Romeo's civil rights.

THE COURT: If they concede that, I would have to grant your motion.

MR. TRIYAK: That is not conceded.

MR. McGUIRE: We would submit the policeman illustration is entirely different. The policeman, as a public employee, is not entitled to step out to enjoy the protection of the state while he goes about battering citizens.

(7-93) THE COURT: I will use the language of Estelle versus Gamble which says if you find the defendants were deliberately indifferent to the medical and psycological needs of Nicholas Romeo, then you may find the plaintiff's Eighth Amendment rights were violated.

As modified, that is 13.

No. 14 is denied. As I have stated again and again, this is not a malpractice suit.

It makes no difference that somebody else would have done it differently.

No. 15 will be affirmed.

No. 16 affirmed.

Well, some of these we won't get into them until we get to the point of damages.

16 is a damage charge, am I correct?

MR. TIRYAK: Your Honor, the purpose of 16 is to let the jury be aware of an earlier instruction which said they had to find color of state law, injury and proximate cause to find liability. It is the earlier one.

This just explicates the language Your Honor already stated you were going to use in an earlier instruction explaining proximate cause, 4, Your Honor, Instruction 4.

THE COURT: Why don't you put it together, so I will understand it.

MR. McGUIRE: Your Honor, we will submit that (7-94) this addendum to the earlier charge simply adds confusion to the minds of the jury.

THE COURT: I guess he just wants a definition of proximate cause.

Is that what you want?

MR. TRIYAK: Yes, so the jury will understand.

MR. WHEELER: I am sure Your Honor is going to charge on proximate cause.

THE COURT: All right, so you don't have any objection. I would just add 16 after 4.

17 is affirmed.

18 will be affirmed.

MR. TRIYAK: It would seem to me 19 would be inappropriate.

MR. PLATT: We can withdraw that on this state of a record, Your Honor.

THE COURT: We will mark it withdrawn.

20 is affirmed.

21 is kind of like a repetition of 17 on the duties of the jury or the guidelines which the jury should have in deciding the credibility issue.

That is a standard Devitt and Blackmore charge. Take your choice, 17 or 21.

Well, I will cover credibility. I don't think it makes much difference which one I use.

(7-95) 22 will be affirmed.

23 will be covered.

I will charge them on credibility, they can take into consideration the bias or prejudice of the witness.

MR. TIRYAK: Your Honor, just to clarify, am I correct you are going to incorporate 23 in another charge?

THE COURT: It is covered in one of your previous charges. I tell the jury—I think it is in your 21. "Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case."

MR. TRIYAK: Would Your Honor include the language in there?

THE COURT: No, that is argument. You want me to make your argument. So I am not going to use your language. I am talking about 23.

MR. McGUIRE: 23 is refused?

THE COURT: Do you have any objection to their statement of their defense?

MR. WHEELER: Which one is that, sir?

THE COURT: No. 24.

MR. McGUIRE: Your Honor, I think there is no need to state argumentatively what the defendants claim.

(7-96) The language should be if the defendants acted in good faith they are immune and are not liable, not merely that they contend that.

This suggests a good-faith defense is something other than the law.

THE COURT: That is made clear in the following paragraph.

"In considering defendants' 'good-faith' defense, you are instructed . . . ," and so forth.

All right, the burden of proof on the defense is on the defendant. No problem with that. That was 25. That will be affirmed.

The remaining charges, I believe, have to do with damages which we don't have to discuss at this point.

MR. TRIYAK: Yes, Your Honor.

THE COURT: All right.

Now, the Defendants' No. 1 is denied.

2 is denied. I don't think anybody is convicted of perjury who is involved in this lawsuit.

No. 3, that will be affirmed. That is going to be covered.

MR. PLATT: One thing on that. Unless it is already included, the end of the first sentence that if a witness had failed to do or say something which is inconsistent with the witness's present testimony, that is objected to.

(7-97) THE COURT: No, that is a standard charge. He may be impeached by his own testimony or by the fact he failed to do something or did something which is not consistent with his present testimony.

That is impeachment.

4. I don't know what you are referring to here in No. 4 under reference to oral admissions.

MR. McGUIRE: Your Honor, we are particularly referring to statements and documents for Nicholas Romeo's commitments which were attested to or signed to by Mrs. Romeo.

THE COURT: Then you don't want No. 4. Why are you putting No. 4 in?

MR. McGUIRE: In that case, we will withdraw it, Your Honor.

THE COURT: No. 5 will be covered.

MR. PLATT: One thing on that. The last part there is not in Rule 33, by introducing an opposing party's answers the party is not bound.

The party whose responses are read into the record is bound.

THE COURT: By introducing opposing party's answers to interrogatories.

MR. PLATT: As long as it is clear the person who responded is bound—

THE COURT: By introducing an opposing party's (7-98) answers to interrogatories a party does not bind himself to these answers and he may challenge them in whole or in part or may offer contrary evidence.

MR. PLATT: We were the only ones who did that, I think.

THE COURT: Didn't you offer something?

MR. McGUIRE: We only made reference in the course of Mrs. Romeo's testimony to an answer she had supplied to the defendants' First Set of Interrogatories.

THE COURT: No. 6 has to do with damages.

No. 7 has to do with damages.

No. 8 has to do with damages.

9, I will change that and say if you conclude that one defendant violated Nicholas Romeo's rights, that alone does not mean that the other two—

MR. PLATT: Yes, that seems appropriate.

MR. McGUIRE: There is a typographical error there, Your Honor.

THE COURT: All right.

So that, as modified, will be affirmed.

10 refers to damages.

Burden of proof will be covered. It will be affirmed.

MR. PLATT: Can that be clarified, Your Honor?

THE COURT: What?

(7-99) MR. PLATT: The defendants may nevertheless have created the environment to cause his injuries.

THE COURT: Are you talking about No. 12?

MR. PLATT: Yes, sir.

THE COURT: No. The mere fact of injury does not mean there is a violation of his constitutional rights. That's all they are asking me to say there.

MR. PLATT: The problem is they say regardless of how many times he was injured, and one of the things this case is about, given the substantial number of injuries, you could find the environment created and maintained by the defendants was illegal and violative of his rights.

THE COURT: The mere fact of injuries does not prove a violation of constitutional rights. What you need is deliberate indifference.

MR. PLATT: That's why I asked Your Honor to modify it.

THE COURT: As stated, it is a correct statement of law, so I will affirm it.

No. 13 is the same thing in a sense as we were just discussing, so that will be affirmed.

No. 14, well, I don't know whether the fact there was a request for his release or weren't requests for his release has anything to do with the violation of his constitutional rights.

(7-100) I am talking about 14.

MR. McGUIRE: In determining whether or not a patient is entitled to treatment of any kind, whether it is a prisoner or a mental patient, the necessary predicate is he be confined against his will.

A person who has never asked to be released can not in any equitable sense be said to be held against his will.

I think the jury has to consider the fact Mrs. Romeo decried the environment at Pennhurst she never took any steps—

THE COURT: She took him home for three weeks and delivered him back into the hands of these people.

MR. McGUIRE: Your Honor, I think the jury is entitled to consider the fact—

THE COURT: You can argue that, but I am not going to make your arguments in the charge.

You can argue she took him home for three weeks and took him back.

MR. McGUIRE: The reason why we included this in here is that any constitutional duty, such as reasonable care or reasonable protection flows from the fact or not that he is being held against his will.

If he is not being held against his will, none of these constitutional rights arise.

THE COURT: I don't know that would be necessari (7-101) ly accurate here in view of the fact he is in there on a court commitment.

MR. PLATT: An involuntary commitment, Your Honor.

THE COURT: It has to be involuntary because he, himself, doesn't have the brains.

MR. PLATT: He doesn't have any will.

THE COURT: I am going to deny 14.

15 will be affirmed.

No. 16 will be affirmed.

MR. TIRYAK: Your Honor, one point with respect to 16.

THE COURT: Yes.

MR. TIRYAK: The Wood v. Strickland test, is inaccurate, at least with respect to the portion after 3.

The language of the Supreme Court in that case stated that if there is a malicious intent you don't need to show a violation of civil rights.

It says civil rights or other injury.

MR. McGUIRE: I think Mr. Tiryak's statement as to our interpretation of Wood versus Strickland is a little bit misleading.

The Supreme Court in Wood versus Strickland clearly associated any maliciousness on the part of a public official defendant with the acts for which he is being sued.

(7-102) Now, it doesn't make any sense if, for instance, on one cloudy day somewhere an ill-advised comment was made. That maliciousness might be entirely separate from the matter of treating Nicholas Romeo. It can't somehow be construed into an (inaudible).

Whatever malice the plaintiff may have established must be something that is associated with Mr. Romeo's constitutional rights.

MR. TIRYAK: Your Honor, the Supreme Court took the trouble of writing down specific words.

THE COURT: Suppose I look at Wood and Strickland and I will accept the Supreme Court's language.

MR. TIRYAK: Yes, with one other point with respect to 16.

Your Honor, the last sentence: "If the state of the law was in doubt, then you must find for the defendants."

First of all, there was no evidence the state of law was in doubt; secondly, as a statement of law it is not correct.

The state of the law was absolutely clear with respect to the duties owed to my client at that time.

THE COURT: I think I understand what you are trying to say. It might be a little inarticulate.

In making this determination you may consider the defendants' knowledge of the law, whether or not the state of (7-103) the law was clear.

Is that what you are trying to say?

MR. McGUIRE: That is not correct, Your Honor.

MR. PLATT: That is not the law. The law is what they knew or should have known.

THE COURT: I didn't say knew or should have known. I say they knew or should have known, but that is a factor they may take into consideration what they believed the state of the law was.

MR. PLATT: Again there was no evidence that anyone believed the state of the law was in doubt.

MR. McGUIRE: Your Honor, I didn't have each and every one of the defendants testify as to his understanding.

THE COURT: To tell you the truth, it is not too clear to me right now what the state of the law is.

The only thing I can do is judge by Estelle versus Gamble, which is the most recent Supreme Court pronouncement on an involuntarily-confined person in receiving the proper treatment.

They say deliberate indifference to the serious medical needs.

How about if I substitute in, in making this determination you may consider the defendants' understanding of the law as it existed during the time in question?

MR. McGUIRE: We have no objection to that, Your (7-104) Honor.

MR. TIRYAK: We will request the statement be made whether they reasonably should have known.

THE COURT: I am going to include the Wood versus Strickland language and also this.

All right, 17, do you have any objection to 17?

MR. PLATT: Yes, Your Honor. There is authority that there can be vicarious liability in civil-rights actions. We would object to that part of it that says there can not.

MR. McGUIRE: Your Honor, we would respond by referring the Court to the trial brief in which I believe we have outlined the law from the Supreme Court—

THE COURT: Only if they had knowledge of the violation by other people, and I thought that was the whole theory of your case, and took no action to correct it.

You gave an example of the police lieutenant standing and watching his man beat up on one of the prisoners.

MR. McGUIRE: If the Court please, I would remind the Court both of these cases long precede Rizzo versus Goode and its progeny in this Circuit and the effect of Rizzo is most compelling.

The Third Circuit has reaffirmed Rizzo in a recent case actually involving the state police and state police supervisory officials in New Jersey.

Strike that, I don't recall whether it was New (7-105) Jersey or Pennsylvania.

THE COURT: New Jersey. The Turnpike case.

MR. McGUIRE: That's right.

THE COURT: They stopped all people with long hair.

MR. McGUIRE: That's it, Your Honor. The Third Circuit made it abundantly clear even though what might have been taking place to these individual citizens was a violation of their rights, that the supervisory officials who might have been involved in this or who actually knew what was going on, they were not people who could be said to have been violating the plaintiffs' civil rights.

The mere knowledge under Rizzo and under Lewis does not amount to participation such as to make the defendant liable.

THE COURT: Mere knowledge is not enough, but mere knowledge would be authority and duty to act may well be.

I think if you would submit a point that said that these defendants are not liable for what somebody else did unless they had knowledge of those things, that what they did was wrong, and they had the authority and power to act, and I think in that situation I agree on your basic proposition that there is no vicarious liability or respondeat superior, that is, the mere fact that a subordinate committed a violation of the constitutional rights is not enough to convict these defendants (7-106) of a violation of constitutional rights.

MR. McGUIRE: And we are talking about one instance of that in this case.

THE COURT: That certainly couldn't go to the jury on that one instance because—

MR. McGUIRE: Well, that is the solitary act of a subordinate that is involved here.

MR. PLATT: There were also omissions involved here as well.

THE COURT: They certainly could not, even if they believed that, even if the jury were to believe he was assaulted by that mental-retardation aide, you could not posit liability on that because there has been no evidence even that they knew that M. R. A. aide assaulted Nicholas before or anything else.

It is as if my secretary would go out and drive her car and hit somebody crossing the street. It doesn't make me liable.

MR. PLATT: There are cases in this District that do hold vicarious liability even for that single act.

THE COURT: Not for that act. Only in the event they had knowledge of it, just like you say in one of your points, that they knew or should have known.

MR. PLATT: That is basically the totality of the circumstances. As to the one assault, though, I think there is (7-107) authority that would permit vicarious liability.

THE COURT: No, absolutely not, not under these circumstances, not unless they were present and could have observed it.

MR. TRIYAK: Your Honor, may I point out one other thing that Lori Lewis testified to?

Lori Lewis did not testify—she testified there was one physical striking with the fist, but she also testified to

the fact that her observation was that Donnie James had threatened Nicholas Romeo with a mop handle.

THE COURT: There was one event which was not brought to the attention of the people at Pennhurst until some months later.

I don't see how you can relate back a violation of constitutional rights because of that one incident.

You certainly can't impute knowledge to them that they were going to do it or that they were there.

I don't think you can impute knowledge of something that happened four months before they were even told about it.

MR. McGUIRE: If the Court please, can we have a charge to the jury on that particular incident?

THE COURT: That even if they find the mere fact that Donnie James struck him, even if they find that he struck him that that is not sufficient to convict them?

(7-108) MR. McGUIRE: That is correct, Your Honor.

THE COURT: If you write something down for me and let me look at it, I will consider it.

MR. McGUIRE: Thank you, Your Honor.

THE COURT: Because I don't see how you can posit liability on that factor alone.

MR. McGUIRE: Your Honor, along with the personal liability lines this court most recently dealt with this in another case involving Pennhurst, that is Judge Broderick in his opinion made it abundantly clear that absent personal participation in this very wrongdoing—and I will

remind the Court the wrongdoing there involved the failure to protect patients from harm, the very kind that is at issue here, and the failure to treat in the least restrictive alternative.

The court held the individual defendants were not liable for that. They didn't cause that situation. They didn't continue its existence, and the existence of those violations was not attributable to them.

Now, those are the same facts that are here and we suggest the court's decision in Halderman ought to be decided along those lines.

THE COURT: It seems to me even if in Halderman Judge Broderick found there was a constitutional violation there obviously was vicarious responsibility because they were subordinates.

(7-109) MR. McGUIRE: And specifically the judge held there could be no vicarious responsibility. The failure was that of the state in terms of appropriate funding.

THE COURT: I will just deny this No. 17 as stated. You can submit something else, something to the effect the mere fact somebody else violated this plaintiff's constitutional rights does not mean that these defendants are responsible for it.

* * *

VII.

CHARGE TO THE JURY

(8-3) (Now, 9:45 a.m., Wednesday, April 26, 1978, trial resumes in the presence of the jury.)

CHARGE OF THE COURT

McGLYNN, J.:

Good morning, ladies and gentlemen.

THE JURY: Good morning.

THE COURT: Well, we are at that stage of the trial where I am going to discharge my responsibility and instruct you as to the law which governs this case, and then it will be up to you.

So that you will have in mind what your ultimate objective here is I want to tell you now that when you return after your deliberations you will be asked whether you find for the plaintiff or for the defendant and we will ask you as to each individual defendant. So the question will be asked do you find for the plaintiff or do you find for the defendant, Youngberg, or do you find for the plaintiff or do you find for the defendant, Matthew, do you find for the plaintiff or do you find for the defendant, Conly, and then you will respond to each of those questions.

(8-4) During the course of my instructions I may refer to the evidence in the case and, when I do so, I am giving you my recollection of the evidence and, if my rec-

ollection of the evidence is not consistent with your recollection of the evidence, then, of course, your recollection prevails, not mine.

You are the jurors. You are the finders of fact. I am only the instructor as to the law.

It is your duty, as jurors, to follow the law as stated by me and to apply these rules to the facts as you find them.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

You are not to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your duty to base a verdict upon any other view of the law than that given in these instructions.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts on the same evidence presented to all the jurors and to arrive at a verdict by applying the same rules of law.

(8-5) You are to perform your duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both the parties and the public expect you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

You should consider each instruction given to apply separately and individually to each of the defendants in the case.

Ladies and gentlemen, this is an action for damages filed by the plaintiff, Nicholas Romeo, against these three individuals for allegedly permitting or acquiescing in the beating of the plaintiff by patients or staff while he was confined at the Pennhurst State School and Hospital.

The plaintiff also alleges that these individuals are liable to him because they sought to punish him for filing this action by shackling him to his bed unnecessarily for long periods of time each day and denying him programs and treatment otherwise available to patients at Pennhurst.

Even though there are three defendants in this action, it does not flow from that fact alone that if (8-6) one is liable all are liable. Each defendant is entitled to a fair consideration of his case and should not be prejudiced by your possible finding against one of the other defendants.

If you find based on the evidence in the case that Nicholas Romeo's civil rights were violated, you must determine if each of the defendants violated Romeo's civil rights.

If you conclude that one defendant violated Romeo's civil rights, that alone does not mean that the other two are also liable.

Of course, the defendants deny they violated the plaintiff's constitutional rights and they also contend that even if Nicholas Romeo's rights were violated, they acted in good faith and without knowledge that their conduct would violate Nicholas Romeo's civil rights and that they acted without malice or malicious intent to cause a deprivation of constitutional right or other injury.

The burden is on the plaintiff in a civil action such as this, to prove every essential element of his claim by a preponderance of the evidence.

If the proof should fail to establish any essential element of his claim by a preponderance of the evidence, the jury, of course, should find for the defendants.

(8-7) To establish by a preponderance of the evidence means to prove something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence that when considered and compared with that opposed to it has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received into evidence, regardless of who may have produced them.

Although the burden is on the party who asserts the affirmative of an issue to prove his claim by a preponderance of the evidence, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action, such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if after consideration of all the evidence in the case the jury believes that what is sought to be proved on that issue is more likely true than not true.

You are to consider only the evidence in (8-8) the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testified. You are permitted to draw from facts which you find have been proved such reasonable in-

ferences as seem justified in the light of your own experience.

You are not bound to decide an issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth as against the testimony of a lesser number of witnesses or other evidence which does produce such relief in your minds.

The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

Each party has introduced into evidence certain interrogatories, that is, questions together with answers signed and sworn to by the other party.

A party is bound by his sworn answers. By introducing an opposing party's answers to interrogatories, however, a party does not bind himself to these answers and he may challenge them in whole or in part or may offer (8-9) contrary evidence.

The means of knowledge are ordinarily the equivalent in law to knowledge. So, if it appears from the evidence in the case that a person had information which would lead a reasonably prudent person to make inquiry through which he would surely learn certain facts, then this person may be found to have had actual knowledge of those facts, the same as if he had made such inquiry and had actually learned such facts.

That is to say, the law will charge a person with notice or knowledge of whatever he would have learned, making such inquiry as it would have been reasonable to expect him to make under the circumstances.

Knowledge or notice may also be established by circumstantial evidence. If it appears that a certain condition has existed for a substantial period of time, and that the party had regular opportunities to observe the condition, then you may draw the inference that he had knowledge of the condition.

Ladies and gentlemen, you are the sole judges of the facts and as the judges of the facts you must determine which of the witnesses you believe, what portion of their testimony you accept and what weight you attach to it.

(8-10) At times during the trial I have sustained the objections to questions asked without permitting the witness to answer or, where an answer has been made, I have instructed that it be stricken from the record and that you disregard it and dismiss it from your mind.

You may not draw an inference from the unanswered questions nor may you consider testimony which has been stricken in reaching your decision. The law requires your decision be made solely upon the competent evidence before you.

Such items as I have excluded from your consideration will be excluded because they are not legally admissable.

The law does not require you to accept all the evidence that I have admitted, even though it be competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each witness and determine the degree of weight you choose to give this testimony.

The testimony of a witness may fail to conform to the facts as they occurred because he is intentionally telling a

falsehood, because he did not accurately see or hear that about which he testifies, because his recollection of that event is faulty or because he has not expressed (8-11) himself clearly in giving his testimony. There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives in everyday affairs. You determine for yourselves the reliability or unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations.

The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives his testimony on the stand, the opportunity that the witness had to observe the facts concerning which he testifies, the probability or improbability of the witness' testimony when viewed in the light of all of the other evidence in the case, are all items to be taken into your consideration in determining the weight, if any, you will assign to that witness' testimony.

If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together.

If, however, that is not possible, you will then have to determine which of the conflicting versions (8-12) you will accept.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified and every matter in evidence which tends to show whether the witness is worthy of belief.

Consider each witness' intelligence, motive and state of mind. Consider the witness' ability to observe the matters to which he has testified and whether he or she impresses you as having an accurate recollection of those matters.

Consider, also, any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently and an innocent misrecollection, like a failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy always consider whether it pertains to a matter of importance (8-13) or to an unimportant detail and whether the discrepancy results from an innocent error or an intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you think it deserves.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time a witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and, thus, discredited, it is your exclusive province to give the

testimony of that witness such credibility, if any, as you think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you think it deserves.

The plaintiff bases his claim upon a law passed by Congress which is Section 1983 of the United States Code, Title 42.

This provides that any person may file a (8-14) suit against and recover damage from any person who acting under color of law knowingly deprived the plaintiff of the rights under the Constitution.

In order to prove his claim the plaintiff has the burden to establish by the preponderance of the evidence in the case, first, that the defendant was acting under color of state law, and I don't think there is any dispute to that here. The three individuals were state employees and acting under the authority granted to them by the state.

Secondly, the plaintiff must prove that the defendants intentionally deprived the plaintiff of rights secured by the 8th and 14th Amendments to the United States Constitution.

Thirdly, the defendants' acts or failure to act were the proximate cause of injury and damage to the plaintiff.

An injury or damage is proximately caused by an act or failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage

and that the injury or damage was either the direct result or reasonably probable consequence of that act or admission.

I can give you an example in this case of (8-15) proximate cause. One of the allegations here is that Mr. Donnie James assaulted the plaintiff, Nicholas Romeo.

Even if you believe that is true, it is not likely that any of the acts of the defendants could have caused any injury as a result of that assault unless they were there and encouraged Mr. James to assault him or condoned his conduct in some other way.

Anything they did after it happened, however, could not be said to have been a cause of the injury to Nicholas Romeo.

As I indicated earlier, the defendants were acting under color of law if their actions were based on authority possessed by virtue of state law, that is, if the defendants were clothed with the authority of state law even if these actions were a misuse of authority.

You are hereby instructed that in this case the defendants were acting under color of state law, so you may regard this element of the plaintiff's case as having been proved.

It is not necessary to find that the defendants had any specific intent to deprive the plaintiff of his civil rights in order to find for the plaintiff. The plaintiff is entitled to relief if the defendants intended the actions or inaction which resulted in a violation (8-16) of plaintiff's rights.

Plaintiff asserts that his constitutional rights were violated by the defendants in four ways. He first contends that defendants' failure to provide him with a reasonable

degree of protection from repeated assaults by patients and staff at Pennhurst violates his rights under the 8th Amendment to the United States Constitution.

The 8th Amendment of the United States Constitution forbids the infliction of cruel and unusual punishment upon persons confined to institutions. The 8th Amendment specifically says excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

Thus, if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo, such failure to act deprived the plaintiff of rights guaranteed by the 8th Amendment.

Plaintiff, Romeo, also contends that his 8th Amendment right to be free from cruel and unusual punishment was violated after this lawsuit was filed by the defendants unnecessarily shackling him to his bed or chair and denying him the opportunity to participate in the same treatment and programs as other residents at (8-17) Pennhurst.

Plaintiff contends that defendant shackled him and denied him programs to punish him for filing this lawsuit.

If you find that any or all of the defendants shackled or caused Nicholas Romeo to be shackled to his bed or chair, or denied him programs as a punishment for filing this lawsuit, those acts deprived plaintiff of his rights guaranteed by the 8th Amendment.

On the other hand, if you find that these acts were taken by the defendants in a good faith effort to treat Nicholas Romeo's condition, then, of course, you should find for the defendants.

The plaintiff also contends that his rights under the 14th Amendment to the United States Constitution were violated by the defendants.

The 14th Amendment to the Constitution provides in relevant part that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the (8-18) laws."

Under the 14th and 8th Amendments, state officials at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff.

Plaintiff, Nicholas Romeo, contends that these defendants violated such a duty to protect him because they were aware of such attacks and failed to take such reasonable steps as required to protect him.

If you find that the defendants were deliberately indifferent to the medical and psychological needs of Nicholas Romeo, then you may find that plaintiff's 8th and 14th Amendment rights were violated.

Now, ladies and gentlemen, this case is not a malpractice case You are not to decide whether Nicholas could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case.

The issue here is whether or not his rights were violated.

Malpractice, that is, the failure to properly treat somebody or negligently treat somebody, does not become a constitutional violation merely because the victim is committed to the custody of a state institution.

(8-19) In order to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident. It is only such indifferences that can offend the standards of decency required by the 8th Amendment.

To find for the plaintiff you need not find that the defendants personally participated in any attack upon the plaintiff. If you find that the defendants were aware of repeated attacks upon plaintiff and failed within their sphere of authority to take reasonable steps to protect the plaintiff, then you may find that the defendants are liable for a violation of the plaintiff's constitutional rights.

On the other hand, if you find that the defendants took all reasonable steps under the circumstances to protect Nicholas Romeo from harm, then you should find for the defendants.

In evaluating the evidence and in determining whether any of the defendants have violated Nicholas Romeo's civil rights, the fact that Nicholas Romeo was injured on occasion, regardless of how many times, does not mean that the defendants caused that injury or that they violated his civil rights.

The mere fact that Nicholas was injured on one or more occasions does not permit you to draw the infer-
(8-20) ence that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent.

In order to show that the treatment of Nicholas Romeo was adequate under the Constitution the defendants need not show that the treatment would cure or improve Nicholas' condition, but only that they made a good faith effort to do so.

The treatment program, including treatment of the mentally retarded in residential groups, does not violate the Constitution merely because it has a negative therapeutic effect or because it has other undesirable side effects.

The plaintiffs have to prove a violation of Mr. Romeo's constitutional rights. The defendants, of course, as I stated earlier, contend his rights were not violated, but they also contend that even if his rights were violated, the actions they took were taken in good faith and, therefore, under the law they are not liable.

If based on the evidence in this case you find that the defendants or any of them violated plaintiff's civil rights, you must then consider whether or not they are entitled to immunity because they acted in good faith.

Good faith means a reasonable reliance on (8-21) the existing procedures and a reasonable belief in their validity at that time.

Immunity means they are not liable even if you found they violated the plaintiff's civil rights.

Under the law the defendants are entitled to immunity unless they knew or should have known that the action which they took within the sphere of their official responsibility would violate Nicholas Romeo's established constitutional rights or if they acted with a malicious intent to cause a deprivation of his civil rights or other injuries.

In considering the evidence in this case you must remember that a mentally retarded patient has the same constitutional rights, but under the law the defendants cannot be held liable for the deprivation of any of plaintiff's civil rights unless they intended the acts which caused the violation of his civil rights, nor can they be held responsible for acts of their subordinates unless you conclude that each defendant had personal knowledge or reason to know that the subordinates were violating Nicholas Romeo's civil rights, had an opportunity to intervene or prevent such conduct and failed to do so.

However, if you find that the defendants did not personally act or fail to act which conduct resulted (8-22) in the violation of Nicholas Romeo's constitutional rights, then even if some other person who is not a party violated the plaintiff's rights, you must return a verdict for the defendants and against the plaintiff.

If you conclude from the evidence that Donnie James struck Nicholas Romeo in the shower, that fact, standing alone, is not sufficient to hold these defendants for violating Mr. Romeo's civil rights. In other words, the mere fact that someone else may have violated Mr. Romeo's civil rights, it does not necessarily follow that the defendants did so, even though he was a subordinate, as I explained to you earlier.

In order to establish this good faith defense each defendant has the burden to establish that by a preponderance of the evidence, that is, they must establish by a preponderance of the evidence that his or her actions or inactions were made in good faith.

Ladies and gentlemen, I am not going to review the evidence. I think counsel has presented their respective

positions to you ably and well and have reviewed the evidence for your benefit.

I have just given you the law which is applicable to this case and now it is your duty to deliberate and to return a verdict in accordance with the evidence and (8-23) the law which I just explained to you.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment.

You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are the judges. You are the judges of the facts and your sole interest is to seek the truth from the evidence in the case.

May I see counsel up here?

(8-24) (The following takes place at side bar out of hearing of the jury.)

THE COURT: Let me ask plaintiff, do you have any objections or exceptions or requests for clarification?

MR. TIRYAK: No.

THE COURT: How about the defendant?

MR. WHEELER: We would ask for a general exception, Your Honor.

THE COURT: You don't get a general exception.

MR. WHEELER: O.K., I don't have any specific exceptions.

MR. McGUIRE: Your Honor, I would enter an exception as to the charge of whether the defendants have the duty to take all reasonable steps, as distinguished from any reasonable steps. It is our view the law supports the notion that it would only be obligated to take reasonable steps and their failure to take all reasonable steps cannot impose liability on them.

THE COURT: It is semantics. When you say reasonable steps, it means—

MR. McGUIRE: Our view is whether they are obligated to take reasonable steps or whether they must (8-25) take all reasonable steps or simply any reasonable steps, and it is our view if they have taken any reasonable steps they have satisfied the duty owed to Nicholas Romeo.

THE COURT: All right.

(Side bar conference concluded and trial resumes in the presence of the jury.)

THE COURT: There are just two final housekeeping instructions. Number 1, you can only have 12 jurors deliberate, so that it would be Jurors 13 and 14, I will ask you to step down now and sit over there.

Then when you go out to begin your deliberations you will select from among yourselves a Foreman or Forelady and that person will preside in your deliberations, but his or her views, of course, are not entitled to any greater weight than the views of any other individual jurors.

(Marshal sworn.)

(Now, 10:20 a.m. jury leaves courtroom to deliberate.)

THE COURT: What about the alternates? If they reach the point of deliberating on damages, I don't think we can put the alternates back in the box?

MR. WHEELER: If they don't participate in (8-26) the deliberations on liability, I would agree with you.

I would have no objection to dismissing the alternates at this time.

MR. PLATT: Yes.

THE COURT: All right, we will just wait for the—don't go away. Don't go too far away. I will let you know when we are going to go to lunch so that you can act accordingly.

(Now, 10:22 a.m. court recesses.)

(Now, 2:13 p.m. jury returns to courtroom with question.)

THE COURT: Ladies and gentlemen, I have your communique and it reads as follows:

"Dear Sir:

"We, the jury, are having difficulty with all of us remembering the exact words of your charge. Is the point of law we are to decide based on the intentional deprivation of the plaintiff's civil rights or the loss of his rights regardless of intent?

"We would appreciate your clarification or restatement of this point."

THE COURT: I am going to respond in this way. Actually, the way your question is phrased, I don't (8-27) think it can be answered precisely.

It is really a three-step analysis. The first step is to determine whether or not the plaintiff's civil rights were violated, that is, whether under the circumstances his treatment was not in accordance with the standards of decency required by the Constitution.

If his treatment was in accordance with the standards of decency under the circumstances, then you should find for the defendants.

If it was not in accordance with the standards of decency, then you go on to the second step.

The second step is to determine whether any intentional act or intentional failure to act on the part of any or all of these defendants caused the violation to the plaintiff.

If you find that there was no intentional act or failure to act on their part which caused the violation, then you should find for the defendants.

If you find that there was an intentional act on their part or failure to act on their part which caused the violation of plaintiff's civil rights, then you proceed to the third step.

The third step is to determine whether or not these defendants were acting in good faith in the treatment (8-28) of this plaintiff and, therefore, if they were acting in good faith, they were immune unless they were acting maliciously or with specific intent to deprive him of his constitutional rights.

So try to remember it is a three-step analysis, whether or not his rights were violated, whether or not these defendants did any act or failed to act that caused that violation and, if those two things were yes, whether or not they were acting in good faith.

If you find in the final analysis they were acting in good faith, there, again, you should find for the defendants.

If they were not acting in good faith when you reach that point, then you find for the plaintiff. It is as simple as that.

You may be excused.

(Now, 2:17 P.M. jury retires to deliberate.)

(Now, 3:05 p.m. jury returns to courtroom with verdict.)

* * *

VIII.

JUDGMENT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO, an incompetent, by his motion and next friend, PAULA ROMEO

vs.

DUANE YOUNGBERG, Individually & in his official capacity as Superintendent, Pennhurst State School & Hospital; RICHARD MATTHEWS, Individually & in his official capacity as Director of Resident Life, Pennhurst State School & Hospital, and MARGUERITE CONLEY, Individually & in her official capacity as Unit Director, Unit 9, Pennhurst State School & Hospital

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CIVIL JUDGMENT

Before Hon. Joseph L. McGlynn, Jr.

AND NOW, this 26th day of April, 1978, in accordance with the verdict of the jury,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of DUANE YOUNGBERG, RICHARD MATTHEWS and MARGUITE CONLEY, defendants, and against NICHOLAS ROMEO and PAULA ROMEO, Plaintiffs.

BY THE COURT:

ATTEST:

(s) Beverlee Bearman
BEVERLEE BEARMAN
Deputy Clerk

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No. 80-1429

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DUANE YOUNGBERG, et al.,

Petitioners,

v.

NICHOLAS ROMEO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NICHOLAS ROMEO

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether review of the Court of Appeals' decision is premature, when the clear error of the trial court in excluding all expert testimony leaves the present record devoid of important evidence, requiring retrial under any standard on the merits.

II. Whether a unanimous decision by the Court of Appeals, sitting en banc, that the trial court had erred in exclusively utilizing the Eighth Amendment in evaluating the conditions of confinement of an institutionalized retarded individual merits review by this Court.

III. Whether a retarded individual, involuntarily institutionalized under state law for care and treatment, has due process rights:

a. to be protected from repeated attacks and injuries to his person;

b. to be free of unnecessary shackles absent an emergency; and

c. to receive treatment which bears a coherent relationship to his needs.

IV. Whether petitioners' contention that they are entitled to good faith immunity as a matter of law merits review by this Court when the issue was neither raised nor decided below.

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No. 80-1429

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DUANE YOUNGBERG, et al.,

Petitioners,

v.

NICHOLAS ROMEO,

Respondent.

BRIEF IN OPPOSITION OF NICHOLAS ROMEO

Respondent Nicholas Romeo respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Third Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, sitting en banc is not yet reported. It is reprinted in Petitioners' Appendix at 1a.

The judgment of the district court, which was a jury verdict in favor of all defendants, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1980. Petitioners would invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law...

United States Statute

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Pennsylvania Statutes

Pa. Stat. Ann. tit. 50, §4401(c):

> Whenever a court commits any person under any provision of this act, it may commit such person directly to a facility willing and able to receive him; otherwise, the court shall commit to a designated local or State facility, or to the Veterans Administration or other agency of the United States upon receipt of a certificate that the person is eligible for such hospitalization and there is available space for his care.

Pa. Stat. Ann. tit. 50, §4406:

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.
>
> (b) If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and treatment.

* * *

Pa. Stat. Ann. tit. 50, §4422:

> Mechanical restraints shall not be used or applied to a mentally disabled person, except:
>
> (1) When necessary to prevent such person from harming himself or others when being transported as provided in sections 405 or 421, or
>
> (2) Whenever the director of a facility or his designee determine that such are required by the medical needs of such person admitted or committed, in which case the same may be used or applied only in accordance with regulations of the department.

STATEMENT OF THE CASE

Petitioners seek review by this Court of the unanimous, en banc decision of the Court of Appeals. All nine judges of the Third Circuit held that critical trial errors by the district court in excluding all expert testimony and charging the jury mandated that the jury verdict for defendants be set aside and a new trial held.[1]

Nicholas Romeo is a thirty-one year old individual who is profoundly retarded.[2] For the first twenty-six years of his life, he lived with his parents and retarded aunt in Philadelphia. (N.T. 1-31).[3] In 1974, Nicholas Romeo's father died suddenly and Mrs. Romeo, unable to obtain assistance for his care in the community, sought his admission to a facility for the retarded. On July 11, 1974, a Pennsylvania Court committed him to the Pennhurst State School and Hospital "for care and treatment" pursuant to the involuntary commitment provisions of Pennsylvania law. (Ap. 34a). See Pa. Stat. Ann. tit. 50, §4406(b).[4]

---

[1] See Opinion of the Court, per Judge Adams (joined by Judges Gibbons, Weis, Higginbotham and Sloviter) at Ap.3a. See also Concurring Opinion of Chief Judge Seitz (joined by Judges Aldisert, Rosenn and Garth) at Ap. 48a.

[2] Nicholas Romeo is an unnamed class member in Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D. Pa. 1977), aff'd, 612 F.2d 84 (3d Cir. 1979) (en banc), cert. granted, 100 S.Ct. 2984 (1980). While this Court is reviewing aspects of that case involving deinstitutionalization, this action involves questions solely concerned with the quality of care provided to a single resident within Pennhurst.

[3] References herein to "N.T." designate items contained in the trial transcript. References to "Ap." designate items in petitioners' appendix.

[4] Under Pennsylvania law, commitment to a mental retardation institution may be made only if the facility is "willing and able" to receive such person. See Pa. Stat. Ann. tit. 50, §4401(c).

It is undisputed that between September 12, 1974 and September 23, 1976, Nicholas Romeo was injured on seventy-seven occasions at Pennhurst. The injuries included a broken arm, a fractured finger, injuries to his sexual organs, human bite marks, lacerations, scratches and black eyes.[5] (Ap. 5a). Some of plaintiff's injuries became infected from inadequate medical treatment or from human feces that the Pennhurst staff failed to clean up. (Ap. 5a).

Having failed to obtain better protection for her son by means of her repeated complaints to Pennhurst officials, Mrs. Romeo filed this action in November, 1976. It sought damages under 42 U.S.C. §1983 against them for failing to protect her son from these repeated attacks. Subsequently, the complaint was amended to state additional claims that defendants had failed to provide Nicholas Romeo with treatment and had unnecessarily shackled him to a bed or chair for long periods of time each day. The Amended Complaint alleged that defendants maliciously had taken these actions against Nicholas Romeo after the commencement of the litigation, in retribution for filing it. (Ap. 86a-92a).

Trial began on April 17, 1978. As to protection, Pennhurst records established that plaintiff had been injured on seventy-seven occasions. Evidence was provided that each defendant was aware of some or all of the injuries. (Ap. 5a). It was not contested that each defendant was responsible for the safety and treatment of plaintiff while at Pennhurst. (Ap. 6a, n.3).

---

[5] Petitioners inaccurately state that the repeated attacks upon Nicholas Romeo by other Pennhurst residents came "mostly" in retaliation for his aggressive actions. An examination of Pennhurst records, admitted into evidence at trial, demonstrates that in only two of seventy-seven cases of injury to Nicholas Romeo was there any suggestion at all that an attack upon him was provoked in any way. See Plaintiff's Exhibit P-5.

As to the claim of unnecessary shackling, defendants admitted that for more than a year since the initiation of litigation, Nicholas Romeo had been shackled to his bed or chair for long periods each day. (N.T. 2-130; Ap. 14a, n.20). In contrast, Nicholas had moved about freely for the twenty-six years that he lived at home with his family (N.T. 1-35-1-37) and restraints had rarely been used upon him at Pennhurst prior to the initiation of the lawsuit. (N.T. 4-188; 5-218).

As to treatment, defendants admitted that Nicholas Romeo received no treatment whatsoever for six full months following the filing of this lawsuit. (N.T. 6-161). Although Nicholas had previously received some treatment at Pennhurst, the quality and amount of that treatment had been found as a fact to be "inappropriate and inadequate." See Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295, 1304 (E.D. Pa. 1977), aff'd, 612 F.2d 84 (3d Cir. 1979)(en banc), cert. granted, 100 S.Ct. 2984 (1980).

At trial, the district court ruled that Estelle v. Gamble, 429 U.S. 97 (1976)[6] controlled all of plaintiff's claims. The trial court interpreted that decision to mean that evidence offered to prove the existence of measures which would have protected plaintiff from repeated violence and which were not utilized by defendants was irrelevant as a matter of law.[7]

---

[6]The trial court, of course, was without benefit of this Court's later decision in Bell v. Wolfish, 441 U.S. 520 (1979) ruling that claims under the Eighth Amendment were applicable only to confinement related to criminal incarceration.

[7]The trial court made that interpretation of Estelle clear:

> ... You are not to decide whether Nicholas could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case. (N.T. 8-18)
>
> It makes no difference that somebody else would have done it differently. (N.T. 7-93)

As a result of the trial court's interpretation of Estelle, it barred the presentation of all expert testimony,[8] and based its instructions to the jury on the Eighth Amendment. On April 26, 1978 the jury found for defendants.

On November 24, 1980, the Third Circuit Court of Appeals, sitting en banc , unanimously vacated that judgment, and remanded for a new trial. All nine judges of that Court agreed that the district court had erred in its blanket exclusion of plaintiff's expert testimony and, following this Court's direction in Bell v. Wolfish, 441 U.S. 520 (1979), determined that the Eighth Amendment was an erroneous standard for evaluating the rights of the institutionalized retarded. (Ap. 3a).

Having so ruled, the Circuit Court majority set forth for the district court "guidance" (Ap.31a) concerning "what may provide a beginning point for a set of jury instructions in a matter of this type." (Ap. 41a).[9]

---

[8]The proferred expert testimony (Ap. 97a-104a) would have shown that:

(1) the lack of treatment provided to the residents at Pennhurst was a direct cause of the violence on the wards in which plaintiff resided;

(2) given the enforced inactivity on the wards, the residents of Pennhurst learned violent behavior as their only means of receiving staff attention;

(3) plaintiff's injuries were "excessive and potentially mutilating, and that appropriate programming of the residents would have prevented much of the violence leading to plaintiff's injuries; and

(4) the prolonged use of shackles on plaintiff after the lawsuit began had no treatment purpose whatsoever, but was used for the convenience of staff.

[9]The Circuit Court also cautioned the trial court that "the specific instructions submitted to the jury must be carefully structured to reflect the actual record that is developed on remand." (Ap. 41a). Thus, to the extent that any issue in this case is deemed worthy of review by this Court, that review would be more appropriate after retrial, when actual instructions are crafted by the district court.

With respect to plaintiff's claim that the defendants had a duty to protect him from repeated attacks while confined at Pennhurst, the Court of Appeals held that plaintiff clearly has a right to have his physical safety protected. (Ap. 23a). The Court recognized that while this right "is not activated by an isolated mishap, or ... by each bruise that a patient may suffer, a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right." (Ap. 23a). In the case of such repeated injuries, defendants' failure to provide for the personal security of plaintiff could be justified only upon grounds of substantial necessity. (Ap. 25a).

With respect to the claim of unnecessary shackling, the Court found that under the Due Process Clause of the Fourteenth Amendment, shackling a resident in non-emergency situations could be justified only when the use of shackles "was essential to protect the patient or treat him." (Ap. 18a).[10] The Court of Appeals also offered an alternative formulation of this holding, finding that shackling a patient was permissible if shackles were the least restrictive means of dealing with the patient in light of his problems and the surrounding environment. (Ap. 18a-19a).[11]

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[10]The Court did not explain what standard should be applied in emergencies, as this issue was not presented, given defendants' routine and daily use of shackles upon plaintiff and others, see Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295, 1306 (E.D. Pa. 1977) aff'd, 612 F.2d 84 (3d Cir. 1979)(en banc), cert. granted, 100 S.Ct. 2984 (1980).

[11]Petitioners mischaracterize the holding of the Circuit Court on this point. At n.14 of their brief, petitioners portray the decision as stating "the use of restraints to protect others is not permissible under any circumstances."

The Circuit Court utilized a three part standard with respect to plaintiff's claims that he had been denied treatment while at Pennhurst. Because plaintiff was involuntarily confined for the purpose of treatment, the Court of Appeals reasoned that a complete failure to treat him would be unlawful absent a compelling explanation. (Ap. 47a). On the other extreme, the Court of Appeals held that the involuntary utilization of a mode of treatment subjecting plaintiff to "significant deprivations of liberty"[12] was unlawful unless it was the least restrictive mode available to accomplish the purpose. (Ap. 31a). Thus, in such rare situations where "unalterable interferences with bodily integrity" are involved, the Court of Appeals ruled that "law and not medicine is the ultimate decisionmaker." (Ap. 31a).

The Court of Appeals explicitly refused to utilize the least restrictive principle in reviewing day-to-day treatment decisions not involving permanent bodily changes:

> ... the application of a consitutional standard of "least intrusive alternative" on continuing treatment programs, which often involve qualitative medical determinations subject to daily, possibly hourly changes, would prove unworkable.

(Ap. 32a).[13]

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[12]The Circuit Court gave several examples of such liberty deprivations: prefrontal labotomy, sterilization, and convulsive therapy. (Ap. 30a, n.44 and accompanying text).

[13]Petitioners erroneously characterize this carefully limited holding as requiring them "to engage in a delicate balancing of constitutional rights in nearly every treatment decision." Petitioners' Brief, at 16.

Having rejected the least restrictive alternative standard for the day-to-day program decisions under review in this case, the Court of Appeals held that defendants must provide treatment to plaintiff which is "acceptable" in the light of present medical or other scientific knowledge. (Ap. 47a). To be acceptable, the Court required simply that a "coherent relationship" exist between the treatment provided and a resident's needs. (Ap. 38a-39a).

Finally, although the issue of immunity was not raised on appeal (Ap. 48a, n.1), the Court of Appeals reminded the trial court that defendants were entitled to a jury instruction concerning the parameters of the "good faith" defense. (Ap. 43a-44a).

Petitioners, rather than waiting to determine the manner in which the district court crafts actual jury instructions from these holdings based upon a fuller record developed upon remand, seek a writ of certiorari from this decision.

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE COURT OF APPEALS DECISION IS PREMATURE, SINCE THE UNPRECEDENTED EXCLUSION OF ALL EXPERT TESTIMONY BY THE TRIAL COURT PREVENTED THE DEVELOPMENT OF AN ADEQUATE RECORD, REQUIRING RETRIAL UNDER ANY STANDARD TO BE APPLIED ON THE MERITS.

The important policy issues present in this case involve a complex interplay between law and medicine. Unfortunately, because of the trial court's blanket exclusion of all expert testimony, the case in its present posture provides this Court with a limited basis upon which to balance these conflicting considerations in crafting the final resolution of these questions.

Nicholas Romeo's claims involve fundamental issues of personal security, unnecessary shackling and a denial of treatment. Petitioners seek a decision by this Court defining the point at which state officials incur liability for their failure to provide care and treatment to involuntarily confined residents. That decision would best be made upon a record which contains expert testimony concerning the availability and efficacy of alternative forms of care and treatment, and their cost.

The clear error of the trial court in excluding all expert testimony has left this record devoid of information on these important subjects.

Whether or not petitioners are correct that the Court of Appeals erroneously evaluated the standards to be applied to plaintiff's claims on remand, a retrial will be necessary. Indeed, all nine judges of the Court of Appeals, including those whose views petitioners espouse here, agreed that the blanket exclusion of expert testimony by the trial court mandated a new trial. (Ap. 3a; 48a).

If, as petitioners contend, [14] the questions posed here are worthy of this Court's consideration, that review would more appropriately await retrial, when a more complete record would be available to this Court. For as Justice Frankfurter has observed, "wise adjudication has its own time for ripening." Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1920) (certiorari may properly be denied where record is "cloudy.") See also Oliphant v. Brotherhood of Locomotive Firemen, 359 U.S. 935 (1959) (certiorari denied due to "abstract context in which the issues sought to be raised are presented by this record...").

II. THE UNANIMOUS DECISION OF THE COURT OF APPEALS, SITTING EN BANC, FAITHFULLY APPLIED THE PRINCIPLES OF BELL v. WOLFISH, IN RULING THAT THE FOURTEENTH AND NOT THE EIGHTH AMENDMENT SHOULD BE UTILIZED IN EVALUATING THE CONDITIONS OF CONFINEMENT OF AN INSTITUTIONALIZED RETARDED INDIVIDUAL.

In vacating the jury verdict for defendants in this matter, the Court of Appeals emphasized that recognition that the case should be controlled by due process, and not cruel and unusual principles was "of critical importance." (Ap. 7a).

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[14] The Petition for Certiorari in this case reads as if it were a petition for rehearing in Pennhurst State School and Hospital v. Halderman, 100 S.Ct. 2984 (1980) or a petition for certiorari in Scott v. Plante, __F.2d__, Nos. 80-1314, 1315 (3d Cir. 1981). It is neither.

This case involves retardation only. Whatever questions there may be concerning the creation of analogous institutional rights for the mentally ill are posed squarely in Scott v. Plante, supra; no such questions are in any way posed in this case. Petitioners have ignored this Court's admonition that "careful attention must be paid to the differences between the mentally ill and mentally retarded." Kremens v. Bartley, 431 U.S. 119, 135-6 (1977).

To the extent that this case well poses any question concerning the rights of retarded people to adequate care and treatment when involuntarily institutionalized, it is a question which is non-recurring, for Congress has, in the Developmentally Disabled Assistance Bill of Rights Act, 42 U.S.C. §6001 et seq., created more stringent standards than the minimal constitutional standards delineated by the Court of Appeals. Thus future litigants, whose claims postdate the new statute, will utilize that statute, rather than the decision here, in pressing their claims.

In so doing, the Court of Appeals faithfully followed the prior decisions of this Court:

> Although the complaint alleged Eighth as well as Fourteenth Amendment violations, Ingraham v. Wright [430 U.S. 651 (1977)] and Bell v. Wolfish, [441 U.S. 520 (1979)] would appear to preclude reliance on the minimal safeguards of the Eighth Amendment in a non-criminal context.

(Ap. 8a)(footnotes omitted).[15]

Thus, because the trial court had based its jury instructions and exclusion of plaintiff's expert testimony upon its interpretation of Eighth Amendment principles, as set forth in Estelle v. Gamble, supra, the Court of Appeals vacated the decision and remanded for a new trial. This outcome is clearly warranted given the erroneous instructions and the unprecedented exclusion of expert testimony by the trial court in a case of this kind.

Significantly, petitioners do not contend that the Eighth Amendment was properly used by the trial court in instructing the jury and excluding expert testimony. Nor do petitioners contend that the nine judges of the Court of Appeals were wrong in vacating the judgment and remanding for a new trial.

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[15]Petitioners incorrectly contend that the lack of clarity of plaintiff's claims led the district court to construe them as arising solely under the Eighth Amendment. On the contrary, respondent sought jury instructions specifically listing the Fourteenth Amendment as a source of claims separate and apart from the Eighth Amendment claims asserted. See, e.g., Plaintiff's Proposed Jury Instruction No. 11 ("Plaintiff also contends that his rights under the Fourteenth Amendment to the United States Constitution were violated by defendants.")(Ap. 94a).

Rather, petitioners assert that questions of great public importance are presented by the guidelines set forth by the Court of Appeals to the district court concerning how it should craft jury instructions upon remand. But review of this case would be more appropriate after retrial, when actual jury instructions are developed by the district court, based upon the more complete record developed at that time.

III. THE GUIDANCE GIVEN BY THE COURT OF APPEALS TO THE TRIAL COURT CONCERNING THE CRAFTING OF APPROPRIATE JURY INSTRUCTIONS ON REMAND DOES NOT MERIT REVIEW BY THIS COURT.

A. The Decision Of The Court Of Appeals That Plaintiff Had A Right To Be Protected From Repeated Attacks Upon His Person Is Consistent With The Decisions Of Five Other Circuit Courts And Does Not Merit Review By This Court.

The Court of Appeals ruled that plaintiff had a right under the Fourteenth Amendment to have his physical security protected while involuntarily institutionalized at Pennhurst. The Court found that while such a right "is not activated by an isolated mishap, or ... by each bruise that a patient may suffer ... a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right." (Ap. 23a). In explaining the right to physical safety the Court held that defendants would be liable[16] for such a series of injuries "unless they can offer explanations based on important interests." (Ap. 26a).

[16]The Court of Appeals also found that "the evidence also suggests that the defendant knew, or had reason to know, of some or all of the injuries suffered by the plaintiff. (Ap. 21a).

Petitioners assert that such a standard will create confusion and an inability to provide treatment on the part of state officials. Their contention is without merit.

Every federal court that has considered the question has determined that state officials who are responsible for operating institutions for the retarded or mentally ill have a duty to protect involuntarily committed residents from repeated attacks by other residents. See, e.g., Rogers v. Okin, 634 F.2d 650, 655-6 (1st Cir. 1980); Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978); Harper v. Cserr, 544 F.2d 1121 (1st Cir. 1976); Spence v. Staras, 507 F.2d 554 (7th Cir. 1978); Halderman v. Pennhurst State School and Hospital, supra; Welsch v. Likens, 373 F.Supp. 487 (D. Minn. 1974), aff'd in part, vacated and remanded in part, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Citizens, Inc. v. Rockefeller, 357 F.Supp. 752 (E.D. N.Y. 1973).

In fact, all courts of the United States are in agreement that even prisoners, who are confined in part for purposes of punishment, have a constitutional right to be protected from their fellow inmates. See, e.g., Woodhous v. Comm. of Virginia, 487 F.2d 889 (4th Cir. 1973); Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970) aff'd, 442 F.2d 304 (8th Cir. 1971) aff'd sub nom., Hutto v. Finney, 437 U.S. 687 (1978); Roberts v. Williams, 302 F.Supp. 972 (N.D. Miss. 1969), modified, 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 1971).

Whether because of the complete unanimity of the lower courts, or the obvious nature of the proposition, this Court has never reached the question of whether state hospital officials have a duty to protect residents of their facilities from

repeated attacks upon their person. This Court has, however, consistently held that the concept of liberty has encompassed the "right to be free from and to obtain judicial relief for unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977). Accord, Hutto v. Finney, 437 U.S. 687 (1978) (affirming remedial measures designed, inter alia, to protect prisoners from rampant violence.)

In determining that administrators "must offer explanations based upon important state interests" for their failure to prevent a repeated series of attacks upon plaintiff, the Court of Appeals in this case did no more than reformulate this Court's language in Ingraham. The Court of Appeals' decision is neither novel, unusual, nor as petitioners contend, harmful.[17]

B. The Court Of Appeals' Decision That Non-Essential Shackles May Not, Absent Emergencies, Be Used On The Retarded Is Unexceptional And Consistent With The Decisions Of All Other Lower Courts.

The Court of Appeals held that non-emergency use of shackles upon an involuntarily-confined retarded individual is justifiable only when "essential to protect the patient or treat him."[18] (Ap. 18a). If less harsh, alternative mechanisms would not deal with the patient "in light of his problems and the surrounding environment" (Ap. 18a), then the use of restraints would be permissible.

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[17] Petitioners' contention that, as a result of this decision, the federal courts will become "the repositories" of personal injury claims by the 150,000 institutionalized retarded is groundless. The proposition rests upon the notion that the gross violation of Nicholas Romeo's rights at Pennhurst is likely to be duplicated elsewhere. If so, respondent would suggest that similar cases would appropriately grace the dockets of the federal courts. However, this too is unlikely, since as Chief Judge Seitz noted in his dissent in Halderman, Pennhurst is "one of the worst institutions of its kind in the world." 612 F.2d at 117 (citing filth, enforced inactivity, violence and "other horrors.") It is therefore unlikely that other retarded individuals in institutions have, as here, suffered from a long series of serious physical assaults.

[18] While this Court has never reached the issue, it has in a recent case assumed that involuntarily committed children have a protectable liberty interest "in being free of unnecessary bodily restraints." Parham v. J.R., 442 U.S. 584 (1979).

Such a proposition is neither novel[19] nor unprecedented.[20] The lower courts are unanimous in holding that intrusive measures such as shackles may be utilized only if less intrusive techniques will not accomplish the same purpose. See, e.g., Halderman v. Pennhurst State School and Hospital, supra; New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27, 30 (2d Cir. 1979); Campbell v. McGruder, 580 F.2d 521, 550 (D.C. Cir. 1978); Welsch v. Likens, 550 F.2d 1122, 1125-6 (8th Cir. 1977); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

As this Court has previously noted, were a person to be shackled and thrown into a dungeon

> "it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish."

Bell v. Wolfish, supra, 441 at 539 n.20.

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[19] Although both the petitioners and a concurring judge below have expressed a belief that the least restrictive standard is unworkable in the context of institutional care, it is undisputed that internal Pennhurst procedures required that the least restrictive procedure be followed. See, e.g., Ap. 99a-100a.

[20] Given the passage of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6001 et seq., it is unlikely that the minimal constitutional safeguards found by the Circuit Court with respect to shackles will be used in future cases. In that Act, shackles are outlawed unless "absolutely necessary." 42 U.S.C. §6010(3)(B)(iii). Thus future litigants will utilize the more stringent statutory standard when claims concerning the utilization of unnecessary restraints are made.

Logically, the Circuit Court's analysis turns upon the question of necessity. In non-emergency situations, shackles are justified if less harsh or intrusive methods would fail to deal with the patient. The non-existence of less harsh alternatives can only mean that shackles are necessary. If means less intrusive than shackles would deal with the problem, then shackles are unnecessary. Unnecessary use of shackles is unlawful.[21]

As used at Pennhurst, physical restraints are potentially harmful, impair the treatment process, and are utilized to control residents in lieu of treatment on a routine basis. See Halderman, supra, 446 F.Supp. at 1306-7. In the instant case, petitioners admitted shackling plaintiff to his bed or chair for long periods of time each day. Plaintiff's experts were prepared to testify that shackles were used on him for the convenience of staff, and had no treatment purposes whatsoever.[22]

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[21]Nor is the concept of restricting state intrusions on fundamental rights to the least restrictive means available to accomplish the legitimate state purpose unclear or alien. This Court has utilized the standard in a number of contexts. See, e.g., Procunier v. Martinez, 416 U.S. 396, 413-414 (1974) (prisoners' First Amendment rights to communicate to outsiders may be curtailed only if restriction imposed is no greater than necessary); Dunn v. Blumstein, 405 U.S. 330 (1972) (state 90 day voting residency requirement unlawful where lesser alternative means to prevent fraud available); Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved."); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (invalidating city ban on sale of milk processed non-locally when less drastic inspection would serve interest in ensuring mile wholesome).

[22]As the Court below observed, under Pennsylvania law, shackles may not be applied to a retarded individual unless the director of a facility determines "that such are required by the medical needs of such person...." Pa. Stat. Ann. tit. 50, §4422. No such determination was made in this case.

Given the unanimity of decisions by all lower courts on this issue, petitioners' inability to articulate a standard appropriate to review the use of mechanical restraints upon citizens of the United States, and their documented abuse of restraint methods,[23] the decision limiting the use of shackles is not one of great public importance.[24]

C. The Court Of Appeals' Decision That An Involuntarily Committed Retarded Individual Had A Right To Treatment Having A Coherent Relationship To His Needs Arose From State Law, And Does Not Create A Federal Malpractice Tort.

This Court has recognized that the involuntary confinement of an individual such as Nicholas Romeo entails a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). To be justified, that restriction on freedom must have a purpose. "At the least," this Court has ruled unanimously with respect to the involuntary confinement of the retarded without treatment, "due process requires that the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972).

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[23] Petitioners state that the Court of Appeals reference to cells "exemplifies its lack of understanding of the subject matter ..." (Petitioners' Brief at 17, n.30.) But see Halderman, supra, 446 F.Supp. at 1306 n.34 and accompanying text. (Finding that the staff at Pennhurst punishes aggressive behavior by placing residents in "seclusion rooms" -- small rooms with hard walls and floors, many of which "have exposed rediators, and other potentials for danger to the resident placed within it.")

[24] Defendants have not asserted that shackling an individual does not impact upon his due process liberty interest. This Court has recognized that "the contours of this historic liberty interest ... always have been thought to encompass freedom from bodily restraint ...." Ingraham v. Wright, 430 U.S. 651, 673-4 (1977).

The purpose of commitment in this case, the Court of Appeals held, is clearly set forth in state law. For, as Chief Judge Seitz noted in concurring: "the state does not contest that it has placed the plaintiff in Pennhurst to provide basic care and treatment." (Ap. 55a).

The Court of Appeals found that a due process interest in treatment arose because, in involuntarily committing Nicholas Romeo to Pennhurst, Pennsylvania deprived him of liberty upon the promise of "care and treatment." Pa. Stat. Ann. tit. 50, §4406(b). When a state conditions the denial of a fundamental interest upon the ground of treatment, "it is plainly unacceptable to suggest that courts are powerless to determine whether the asserted ground is present." O'Connor v. Donaldson, 422 U.S. 563, 574 (1974)(n.10).

That state law requires treatment is indisputable. The Pennsylvania Supreme Court has held unanimously that the state statute involved in this case mandates the provision of treatment to the retarded in Pennsylvania.[25] See In Re Schmidt, __Pa.__, 425 A.2d 393 (1981). See also In Re Guzman, __Pa.__ Cmwlth.-Ct.__, 405 A.2d 1036, 1038 (1979)("when the state ... commits retarded persons it must provide 'minimally adequate habilitation'"); County of Allegheny v. Commonwealth Department of Public Welfare, 33 Pa. Cmwlth. Ct. 267, 381 A.2d 1014, 1016 (1978). See also Com. ex rel. DiEmilio v. Shovlin, 449 Pa. 177, 295 A.2d 320 (1972).

[25]Despite the unanimous decision of the Supreme Court of Pennsylvania in Schmidt, petitioners maintain that Pennsylvania law mandates only that care be provided to the institutional retarded. See Petitioners' Brief at 18.

Similarly, several decisions of the federal courts sitting in Pennsylvania have read the statute as mandating treatment. See, e.g., Eubanks v. Clarke, 434 F.Supp. 1022, 1026-7 (E.D. Pa. 1977)(Lord, Ch.J.); Halderman v. Pennhurst State School and Hospital, supra, 446 F.Supp. at 1322.

Whatever the case may be in other jurisdictions, Pennsylvania law mandates that the involuntarily confined retarded receive treatment.[26]

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[26] Ignoring the fact that both the Supreme Court of Pennsylvania and the Court of Appeals have unanimously interpreted Pennsylvania law as mandating treatment, Petitioners contend that Pa. Stat. Ann. tit. 50, §4406(a) requires only that care be provided to the institutionalized retarded.

Clearly, Pa. Stat. Ann. tit. 50, §4406(a) is a statutory provision designed to provide for involuntary examinations of persons to determine if treatment is necessary. Just as clearly, Pa. Stat. Ann. tit. 50, §4406(b) provides that after such an examination, the local court "may order the commitment of such person for care and treatment." Thus Nicholas Romeo's deprivation of liberty was conditioned upon a state law created expectation of care and treatment.

Even if, as petitioners contend, plaintiff's liberty interest could have been fulfilled by the provision of care "or" treatment, it does not follow that Nicholas Romeo's liberty interest would be extinguished. This is true because petitioners have also failed to provide him with care. It is undisputed that Nicholas Romeo received seventy-seven injuries while at Pennhurst, some of which became infected as a result of fecal matter or unsanitary medical treatment. Thus defendants can hardly be said to have extinguished his liberty interest in treatment as a result of the provision of minimally humane care. See Wyatt v. Aderholt, supra, (rejecting Alabama's claim that involuntary commitment without treatment can be constitutionally justified on the basis of the provision of care alone, where minimal care is not provided.)

While other states may have failed to create through statute a liberty interest in treatment for the involuntarily institutionalized retarded, Pennsylvania clearly has done so. Petitioners' attempt to alter this plain fact by reliance on a statutory provision which was not the basis of the decision below, and by ignoring the interpretation of the statute by both Pennsylvania appellate and local federal courts is delusive.

Having found a due process liberty interest in treatment arising from Pennsylvania law,[27] the Court of Appeals was required to determine if the interest in treatment was fulfilled by petitioners.

In doing so, the Court of Appeals carefully limited its decision with respect to plaintiff's claim that he was denied treatment, precisely because it recognized that "questions of a court's relative competence concerning medical decisions and respect for medical judgment, as well as concerns of comity with the legislative and executive branches, place this claim in a different perspective." (Ap. 27a).

Given the lack of clarity of the record in this case, occasioned by the district court's wholesale exclusion of expert testimony, the Court of Appeals was required to address the treatment issue in a number of contexts.[28] First, it held that defendants would be liable for a complete failure to provide any treatment to plaintiff, absent a compelling justification.

On the other extreme from a complete lack of treatment is the use of involuntary treatment techniques such as "nonreversible physical operations," (Ap. 30a) "permanent physical alterations" (Ap. 30a) or other modes of treatment which cause "significant deprivations of liberty." (Ap. 47a). In such situations, due to the "existence of a judically assessible, discrete act, which entails a significant loss of individual liberty ...' (Ap. 30a), the Court of Appeals ruled that such treatment techniques

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[27]Because Pennsylvania law created an expectation of treatment, the Court of Appeals in this case had no occasion to reach the question of whether the provision of needed custodial care without treatment can justify the involuntary confinement of the retarded.

[28]Indeed, it would be more appropriate for this Court to review the instant case after re-trial, after a fuller record is developed, when it can be ascertained which, if any, of the treatment charges is given by the trial court.

may not be involuntarily utilized unless they are the least intrusive available. (Ap. 47a).

The Court of Appeals carefully recognized however, that most treatment questions fall between these two extremes. In such cases "legal questions of unconstitutional liberty deprivations begin to merge with medical judgments ..." (Ap. 31a). Thus, the Court rejected as "unworkable" the use of the least intrusive analysis for such treatment decisions "which often involve qualitative medical determinations subject to daily, possibly hourly changes ..." (Ap. 32a). Instead, the Court of Appeals held that plaintiff was entitled to a form of treatment which is "acceptable" in light of present medical or other scientific knowledge. (Ap. 38a). To be acceptable the Court required simply that a "coherent relationship" must exist between a patient's needs and the treatment provided.[29] (Ap. 38a).

In holding that due process requires that the treatment provided have a coherent relationship to the resident's needs, the Court of Appeals did no more than follow the stricture of this Court in Jackson v. Indiana, supra, that, at a minimum, there be "some reasonable relation" between the purpose and nature of the confinement of the retarded.[30] The limited constitutional

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[29]The limited constitutional standard enunciated by the Court of Appeals with respect to treatment claims is unlikely to be utilized by future litigants. This is so because a recent federal statute requires that "adequate" treatment be provided to the institutional retarded. 42 U.S.C. §6010(1) and (2). While the Court of Appeals was compelled to reach the constitutional issue because a portion of Nicholas Romeo's claims predate that statute, future ligigants will most certainly utilize the more stringent statutory standard than the limited requirement set forth in this case.

[30]Whatever differences may exist between the "coherent relationship" standard adopted by the Court of Appeals and the standard utilized by this Court in Jackson need not detain us here. It is sufficient to note that, to the extent that any difference in standard exists, that difference does not present issues of great public importance.

requirement that a coherent relationship exist is neither wrong,[31] not akin to malpractice as petitioners maintain.[32]

IV. PETITIONERS' CONTENTION THAT THEY ARE ENTITLED TO "GOOD FAITH" IMMUNITY AS A MATTER OF LAW DOES NOT MERIT REVIEW BY THIS COURT, SINCE THE ISSUE WAS NEITHER RAISED NOR DECIDED BELOW.

Petitioners seek to raise before the Supreme Court of the United States an issue which previously was not raised or decided in this litigation: petitioner's entitlement to a "good faith" immunity as a matter of law. See Procunier v. Navarette, 434 U.S. 555 (1978). Such a defense is available to a defendant state official in a 42 U.S.C. §1983 damage suit as a matter of law, only when the official could not reasonably have known that his actions were unlawful. Id.[33] Otherwise, defendants may submit the factual question of whether they knew or should have known that their actions were unlawful to the jury. See O'Connor v. Donaldson, supra; Wood v. Strickland, 420 U.S. 308, 322 (1975).

In the instant case, defendants did not argue before the trial court that they had a good faith immunity as a matter of law. Nor did petitioners claim such a defense before the Circuit Court. Indeed, as Chief Judge Seitz noted in his concurring opinion, "the existence of a qualified immunity defense is not raised on this appeal." (Ap. 48a, n.1).

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[31] Petitioners have not contended that any conflict exists in the Circuit Courts over the issue of whether an involuntarily committed retarded indidivual can be denied treatment. All Courts of Appeal that have considered the question have found such a right to exist. See, e.g., Welsch v. Likens, 550 F.2d 1122 (8th Cir. 1977); Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 967 (1974); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1975); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). Indeed, as Chief Judge Seitz noted in concurring, the "existence of a constitutional right to care and treatment is no longer a novel legal proposition." (Ap. 54a).

[32] Petitioners have not suggested in their brief what an appropriate standard for denial of treatment claims should be, but did contend below that "these defendants, as individuals, owe nothing to Nicholas Romeo." (Ap. 107a)

[33] As this Court made clear in Procunier v. Navarette, 434 U.S. 555 (1978), the good faith immunity is not available as a matter

(Cont'd next page)

Petitioners are therefore barred at this late date from seeking resolution in the Supreme Court of an issue which they had more than ample opportunity to present below. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 233-234 (1976). See also Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 37-38 (1976); Singleton v. Wulff, 428 U.S. 106, 120 (1976).

This rule is modified only in "exceptional cases." Duignan v. United States, 274 U.S. 195, 200 (1927). See also Hormel v. Helvering, 312 U.S. 552, 558 (1941)(rule modified if the "obvious result" would be "a plain miscarriage of justice.") Here, where defendants were represented by counsel below, Pollard v. United States, 352 U.S. 359 (1957), had a full opportunity to raise an established defense, United Brotherhood of Carpenters and Joinders of America v. United States, 330 U.S. 395, 411 (1947) and have made no showing of exceptional circumstances to justify extraordinary action by this Court, Singleton v. Wulff, supra; Hormel v. Helvering, supra, this Court should decline to review petitioners' claim.[34]

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33 cont'd
of law in situations, as here, where malice is alleged. See Ap. 90a. Thus, if this Court were to review this issue, raised initially by petitioners in this Court, petitioners' claim would be groundless.

[34]Given the pendency of the Halderman litigation against these defendants since 1974, petitioners' claim of an absolute good faith immunity is, on the merits, frivolous.

CONCLUSION

For the above-stated reasons, the Court should deny the petition for a Writ of Certiorari herein.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DUANE YOUNGBERG, et al.

Petitioners,

v.

NICHOLAS ROMEO,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Nicholas Romeo, confined at the Pennhurst State School and Hospital, asks leave to file the attached brief in opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent was granted leave to proceed in forma pauperis in the Circuit Court below, but did not seek such status in the trial court.

The affidavit of Respondent's mother and next friend in support of this motion is attached hereto.

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No. 80-1429

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DUANE YOUNGBERG, et al.,

Petitioners,

v.

NICHOLAS ROMEO,

Respondent.

AFFIDAVIT IN SUPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Paula Romeo, being duly sworn, depose and say that I am the mother and next friend of respondent Nicholas Romeo, an incompetent, in this case; that in support of my motion to proceed without being required to prepay fees, costs or security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. My son, Nicholas Romeo, is profoundly retarded, and has never been employed. I am a widow and presently care for my mentally retarded sister. I am not employed, and have not been since childhood.

2. My entire present source of income is $423 per month, from my deceased husband's annuity and the Veterans' Administration. Pennhurst receives $180 per month for my son's care, but those funds are not available to him to pay costs in this matter. He has no other source of income.

3. I have no checking account. I have a savings account with a current balance of $226.00. My son has no bank accounts.

4. My son owns no real estate, stocks, bonds, notes, automobiles or other valuable property. I own a 1970 Buick, and my home which was purchased in 1960 for $10,500. I own no stocks, bonds, notes or other valuable property.

5. My sister is mentally retarded, is dependent upon me, and resides with me in my home.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

PAULA ROMEO

Sworn to and subscribed
before me this 25th day
of March, 1981.

Notary Public

MARLA FRIMARK

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NO. 80-1429

IN THE SUPREME COURT OF THE UNITED STATES

DUANE YOUNGBERG, et al.,

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NICHOLAS ROMEO,

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SUPPLEMENTAL BRIEF OF RESPONDENT NICHOLAS ROMEO

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SUPPLEMENTAL BRIEF OF RESPONDENT NICHOLAS ROMEO

Respondent Nicholas Romeo, pursuant to Rule 22 of the Supreme Court Rules, files this Supplemental Brief in response to the briefs of several amici curiae, which were not available at the time of respondent's last filing.

1. The amici erroneously read the Court of Appeals decision as "a substantial intrusion by the federal courts into medical decisions." (Motion of American Psychiatric Assoc., p.2). Such a contention is at odds with the facts and slurs the substantial distinctions between medical practice generally, and compulsory institutional care.

Nothing contained in the decision of the Court of Appeals is applicable to the physician-patient relationship as that relationship is generally envisioned. Virtually every psychiatrist, doctor and psychologist in this country may continue to engage in private or public practice in providing treatment to consenting patients without thought of the Romeo decision.

However, when states delegate to physicians the power to compel unwilling patients to accept confinement, shackles, and intrusive treatment techniques, physicians adopt a role different than that of a family doctor. Federal and common law restrictions on the power of physicians to treat non-consenting patients have never been thought to be an intrusion on medical decisions. Indeed, this Court has always recognized that there are federal constitutional limitations upon the power to restrict the liberty of patients for the purpose of providing unwanted treatment. See O'Connor v. Donaldson, 422 U.S. 563 (1974); Jackson v. Indiana, 406 U.S. 715 (1972).

Not one of the claims by respondent in this case involve a challenged medical judgment. None of the defendants is a psychiatrist, doctor or psychologist.

With respect to the seventy-seven injuries that Nicholas Romeo received at Pennhurst, respondent's claim was founded upon proferred expert psychological testimony which would have demonstrated that the violence on his ward was a result of the defendants' failure to provide behavioral programs at Pennhurst. (Ap. 98a-99a). The programs sought were not medical in nature, nor was the failure to provide them based on a medical judgment. In fact, no defendant ever contended in this litigation that the failure to provide such treatment was based upon a medical judgment.

Similarly, with respect to shackles, respondent's claim was founded upon the non-medical nature of their use upon Nicholas Romeo. Respondent's expert psychologist was prepared to testify that the use of shackles upon him was not based upon a medical judgment, but rather was for staff convenience. (Ap. 101a).

The non-medical nature of the utilization of long-term restraints upon Nicholas Romeo is clearly established by the facts of this case. No physician at Pennhurst has the power to order that a resident be shackled. Rather, as the Court of Appeals recognized, that decision is reserved under Pennsylvania law to the Superintendent of the facility -- in this case a layman. See Pa. Stat. Ann. tit. 50, §4422. (Ap. 16a, n.25).

It is therefore apparent that respondent's claims of physical abuse and unnecessary restraints do not relate to medical judgments at all. The policy of enforced inactivity of residents at Pennhurst, which inevitably led to the rampant violence on the wards at that facility was not part of any medical judgment. The prohibition

against unnecessary restraints adopted by the Court of Appeals cannot intrude upon medical judgments, since physicians in Pennsylvania have no power to determine that restraints be used.

Finally, the Court of Appeals did not intrude into medical decision-making in holding that treatment must be provided to the institutionalized retarded, when the purpose of confinement was the provision of treatment. The Court below, explicitly stating its deference to the medical profession (Ap. 27a) limited judicial review of the treatment provided to whether the form of treatment had a "coherent relationship" to the patient's needs. (Ap. 38a).

Such a standard permits the courts to ensure that the purpose of the liberty deprivation is carried out, while avoiding judicial intervention into what the Court of Appeals recognized to be a mixed legal/medical issue. (Ap. 27a). By limiting judicial review in the manner utilized by the Court below, courts need not decide if the treatment decision was the most appropriate (Ap. 38a, n.57), but only that a medically based decision was made. Even then, "security concerns, administrative necessities and fiscal constraints" (Ap. 38a) are valid defenses.

Thus the standard adopted by the Court of Appeals does not intrude on medical judgments, but only insures that such judgments are made. Such limited review avoids placing the judiciary in the awkward position of deciding which of several treatment techniques is best. See, e.g., Parham v. J.R., 442 U.S. 584 (1979). Given the limited standard adopted, the Court of Appeals recognized that the judiciary has "the tools to ascertain whether the constitutional minimum of medical acceptability ... is being fulfilled." (Ap. 39a-40a).

2. The amici seriously misread the Court of Appeals decision concerning the utilization of least restrictive principles to this case. For example, the American Psychiatric Association asserts that

> Although the notion of a least restrictive treatment is superficially enticing, the concept in practice may be almost unworkable.

Brief of American Psychiatric Association, at 7, n.5. (emphasis added).

But the Court of Appeals rejected the least restrictive standard for day-to-day treatment decisions in much more definite language:

> ... the application of a constitutional standard of "least intrusive alternative" on continuing treatment programs, which often involve qualitative medical determinations subject to daily, possibly hourly changes, would prove unworkable.

(Ap. 32a)(emphasis added).

Thus the Court of Appeals limited its use of least restrictive principles to extraordinary treatment modalities, such as involuntary sterilization, and prefrontal labotomy. (Ap. 30a, n.44). The principle was rejected by the lower Court in daily medical decisions.

The retention of the least restrictive principle in such rare, intrusive modalities is a wise exercise of judicial discretion. In cases of extremely intrusive medical techniques, decisions concerning the appropriateness of medically-indicated treatments are not simply medical questions. No one would contest that a medically indicated abortion could be appropriately rejected by a patient (or the guardian of an incompetent patient) on religious grounds having nothing to do with medical factors. Permanent physical alterations of the brain, as in prefrontal labotomy, raise similar issues not related to pure medical judgments.

3. Nicholas Romeo is not mentally ill. No resident of Pennhurst is mentally ill. (Ap. 4a, n.1). Respondent has never been treated by a psychiatrist. None of respondent's claims concerning a denial of treatment involve an assertion by him that psychiatric care was needed, or even desirable.

"Careful attention," the Court has written, "must be paid to the differences between the mentally ill and mentally retarded." Kremens v. Bartley, 431 U.S. 119, 135-36 (1977).

As the Court below recognized:

> Mental retardation is an impairment in learning capacity and adaptive behavior, and is not treatable, like mental illness, by means of drugs or psychotherapy.

(Ap. 4a, n.1).

This case is exceedingly complex, involving three constitutional claims concerning the involuntarily institutionalized retarded. Because of the trial court's error, the present record is devoid of expert testimony concerning the application of psychological techniques to the retarded.

In such a context, the review by this Court of the position of the American Psychiatric Association, whose expertise is of no use to the retarded, could be misleading and would be unfair to respondent. This case should not be decided with reference to "the baffling field of psychiatry." O'Connor v. Donaldson, supra, 442 U.S. at 578 n.2 (concurring opinion). Accordingly, the Motion of the American Psychiatric Association for Leave to File as Amicus Curiae should be denied.

4. The amici contend that the potentiality for liability created as a result of the decision of the Court of Appeals will make it difficult for states to attract competent staff to their facilities. This is so, it is argued, because staff can be held liable under the Romeo standard for conditions that they cannot change.

The states, having constructed isolated facilities, systematically underfunded them, and paid uncompetitive salaries, cannot place the blame for their inevitable staffing problems upon the Court of Appeals.

Well before this case was filed, the Director of Information for the Joint Commission on Mental Illness had commented that "Physicians who fancy themselves as medically respectable have tended to shun these places." See Bartlett, F.L. Institutional Peonage: Our Exploitation of Mental Patients, 214 Atlantic 116 (1954).

The reason, of course, was not due to potential liability, but because of the abject failure of the amici in funding institutions. As the President of the American Psychiatric Association wrote in 1958:

> I do not see how any reasonably objective view of our mental hospitals today can fail to conclude that they are bankrupt beyond remedy.

Solomon, H. The American Psychiatric Association in Relation to American Psychiatry, American Journal of Psychiatry (1958) at 115.

The disasterous conditions prevelent at Pennhurst will prevent the attraction of quality staff, no matter what the state of the federal law is concerning staff liability. Doctors do not decide where they will practice by perusing advance sheets.

Contrary to the assertion of the American Psychiatric Association, this case does not present "questions regarding the imposition of liability without fault for constitutional torts." (Brief of the American Psychiatric Association, at 12). The Court of Appeals decision addresses questions concerning the rights of the retarded in an institutional context.[1]

The Court below never addressed the question of whether a particular defendant may be liable for a constitutional violation beyond his control. The proposed solutions of the American Psychiatric Association, involving a restructuring of the good faith defense, were not considered by the Court of Appeals, much less rejected.

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[1] Pennsylvania law indemnified defendants in cases such as this from personal liability. See 4 Pa. Code §39.2(a).

There is no good reason to grant the petition for certiorari on considerations not reached or presented below.

5. Several amici contend that a speedy resolution of the constitutional claims involved herein would assist them in planning their budgets, and help lower courts in deciding numerous similar cases pending below. Such factors are present in virtually all certiorari petitions.

But haste to resolve difficult constitutional questions does not facilitate wise adjudication, particularly here, where only a remand has been ordered, and the record is devoid of expert testimony which would be so useful to the Court in making its decision.

There is no need for speed in seeking to determine these questions. The instant case is non-final, with no finding of liability. Indeed, this Court does not generally review non-final decisions. See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916)(lack of finality "of itself alone furnished sufficient ground for the denial..."); Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967)("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). This Court's power is to "correct wrong judgments, not to revise opinions." Herb v. Pitcairn, 324 U.S. 117, 125 (1944).

Since, as the amici conceed, numerous other cases are pending below which raise the same issues as this one, this Court will have numerous opportunities to review a final judgment which contains a record worthy of this Court's analysis. In the interim, alternative formulations of the rights involved may be adopted by other Circuit Courts, giving this Court the benefit of additional available options.

Alternatively, the Courts of Appeal may arrive at a concensus on their own on the rights in question thus obviating the need for review by this Court.

The petition for certiorari should be denied.

Respectfully submitted,

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Respondent.

PROOF OF SERVICE AND FILING

EDMOND A. TIRYAK, Counsel for Respondent herein, being duly sworn, deposes and says that, on the below date he placed copies of Respondent's Supplemental Brief, postage prepaid, into the United States mail, addressed to the Clerk of this Court, and to the counsel listed on the pages attached hereto.

I certify that all persons who should have been served, have been served.

DATED: 5/8/81

Edmond A. Tiryak
EDMOND A. TIRYAK

Sworn to and subscribed
before me this 8th day
of May, 1981.

Abigail Whitt
Notary Public

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Notary Public, Phila., Phila. Co.
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No. 80-1429

In The Supreme Court of the United States

October Term, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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STATUTE:

Developmentally Disabled Assistance and Bill of Rights Act (DD Act), 42 U.S.C. Sec-6001 et seq. 2, 3

SUPPLEMENTAL STATEMENT OF THE CASE

At several places in the brief in opposition to the grant of certiorari,[1] respondent Romeo refers to the "unanimous, *en banc* decision of the Third Circuit." *See, e.g.*, Romeo Bf. at 5. While all of the circuit judges agreed that a new trial was necessary, four of the nine judges drastically disagreed with the nature and scope of the rights created by the other five judges. App. 48a-78a.[2]

Throughout his brief, respondent Romeo asserts as facts matters which were in many cases the subject of conflicting testimony presented to the jury. Because the jury did not answer any interrogatories in finding for the defendants here, these statements simply represent matters on which plaintiff presented testimony, and not necessarily the facts of the case.

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[1] Citations to this brief will be in the following form: "Romeo Bf. at 1, 2, etc."

[2] "App." references are to petitioners' appendix to the petition for writ of certiorari.

ARGUMENT

I. This Case Is Presently in the Proper Posture To Be Considered by This Court

Respondent's principal argument appears to be that review of this case should await the remand to the district court. This Court has not hesitated in the past to review a circuit court order involving a remand which involves a clearly-articulated legal issue. *See, e.g., Okin v. Rogers,* No. 80-1417, *cert. granted,* April 20, 1981; *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980). In light of the confusion and uncertainty created by the Third Circuit's opinion, a remand here would serve no useful purpose.

The importance of a decision in this case has been highlighted by the decision of this Court in *Pennhurst State School and Hospital v. Halderman,* 49 U.S.L.W. 4363 (April 20, 1981). In *Pennhurst,* a majority of this Court declined to find a right to treatment under the Developmentally Disabled Assistance and Bill of Rights Act (DD Act), 42 U.S.C. §6001 *et seq.*[3] So long as the constitutional rights of the institutionalized mentally retarded are not addressed by this Court, uncertainty and confusion will continue.

[3] Respondent has argued that this case does not merit review because the same rights exist under the DD Act. Romeo Bf. at 13, n. 14, 18, n. 20, 24, n. 29. This Court's rejection of such an argument in *Pennhurst* substantially undermines respondent's argument here.

Moreover, this Court's discussion in *Pennhurst* has cast doubt on both the holding and the reasoning of the Third Circuit opinion in *Romeo*. In *Pennhurst*, this Court stated that it had "never found the involuntarily committed have a constitutional 'right to treatment,' much less the voluntarily committed," 49 U.S.L.W. at 4367, n. 12, citing both *Sanchez v. New Mexico*, 306 U.S. 276 (1970) (dismissing for want of a substantial federal question a lower court decision holding that the involuntarily committed have no right to treatment), and *O'Connor v. Donaldson*, 422 U.S. 563, 587-89 (1975) (Burger, C.J., concurring) ("right to treatment" criticized). The Third Circuit majority, however, stated that *Sanchez* was no longer binding due to "subsequent doctrinal developments" (App. 37a, n. 56). The developments cited were *O'Connor* and the DD Act (App. 38a, n. 56). In addition, while the Third Circuit analyzed the "right to treatment" in terms of "least restrictive," "least intrusive," "adequate" and "acceptable", this Court commented on similar standards under the DD Act in *Pennhurst:* "It is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting. . . ." 49 U.S.L.W. at 4368. It would be anomalous to find that such uncertain terms nonetheless are constitutionally based.

Finally, respondent's suggestion that the admission of expert testimony on remand will narrow the issues here is chimerical. At a re-trial, the district court judge would have to decide what testimony is relevant under the Third Circuit's opinion. If the Third Circuit decision is incorrect in any way, there is a great likelihood of reversible evidentiary rulings on re-trial.[4] Thus, judicial economy

[4] Because *Romeo* is binding in the Third Circuit at present, other cases will be affected so long as the decision stands.

would best be served by this Court's considering *Romeo* now.[5]

II. The Issue of Good Faith Immunity Has Been Preserved for Appeal and Provides the Basis for Affirming the Jury's Determination

---

Respondent's suggestion that the issue of good faith immunity as a matter of law was not raised below is simply untrue. Judge McGlynn specifically instructed the jury on good faith immunity (App. 113a-114a) and defendants argued the issue in their brief in the Third Circuit (Brief of Appellees at 33-40). In any event, appellees do not have the burden of raising by a cross-appeal the issue of good faith immunity where a jury has found in their favor. Any grounds which provide a basis for affirming the jury's verdict were properly before the Third Circuit.

Alternatively, respondents seem to suggest that, due to the mere filing of the *Pennhurst* litigation in 1974, no one can claim good faith immunity for actions after that date. *Romeo* Bf. at 26, n. 34. Even if the Third Circuit decision were to stand, no one can seriously argue that the *Romeo* "rights" were "clearly established" prior to

---

[5] Respondent's citation to *In Re Schmidt*, Pa. , 425 A.2d 393 (1981), for the proposition that he has a state law right to treatment is mystifying. While *Schmidt* contains language concerning such a right, it is plainly dicta and comes at least three years after the events in question here. More importantly, Romeo has never pled a state law claim. *See* Second Amended Complaint (App. 86a-92a).

the date of that decision, let alone by the mere filing of a lawsuit in 1974. *See Procunier v. Navarette*, 434 U.S. 555 (1978). Thus, because the record would not support a finding of intent to injure plaintiff and the alleged rights were not clearly established at the time in question, the Third Circuit should have dismissed the claim for damages.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

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FILED
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NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

AMICI CURIAE BRIEF in Support of the Grant of a Writ of Certiorari on Behalf of Alabama, American Samoa, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington and West Virginia

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has not yet been reported.

The opinion of the United States District Court for the Eastern District of Pennsylvania on the motion to dismiss is unreported. Both opinions are reproduced in the appendix to the petition for writ of certiorari of Duane Youngberg *et al.*

CONSENT OF THE PARTIES

Consent of the parties is not required since this brief is presented on behalf of the States, Commonwealths or Territories of Alabama, American Samoa, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, and West Virginia, by their respective Attorneys General (hereinafter *Amici*). See U.S.S.Ct. Rule 36.4.

INTEREST OF AMICI CURIAE

In *Romeo*, the Third Circuit pronounced new constitutional rights for mentally retarded persons. The interest of *Amici* stems from their role in providing services to the mentally retarded and the significant impact of this decision on those responsibilities.

As a matter of "substantive due process", the Court of Appeals declared that institutionalized mentally retarded persons have: (1) a right to receive that treatment which is acceptable in light of present medical or other scientific knowledge and the least intrusive treatment available under the circumstances, (2) a right to be free of restraints, whether for treatment or protection, absent a showing of compelling necessity; and (3) a right to be protected from harm absent a showing of substantial necessity. These rights are apparently in addition to the statutory right to treatment in the least restrictive alternative found by the same court to be enforceable by a private cause of action under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6001 *et seq.*, in *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *cert. granted*, 100 S.Ct. 2984 (1980) (argued Dec. 8, 1980).

Nearly all of the states have been confronted with litigation based on the constitutional claims raised in *Romeo* and/or the statutory claims presented in *Penn-*

hurst.[1] If this Court decides the statutory issues in *Pennhurst* without reviewing the *Romeo* constitutional issues, uncertainty will continue in this area of law until each of the other courts of appeals passes upon these questions.

Moreover, should the decisions of the Third Circuit stand, additional lawsuits are inevitable. Considering that in 1976 there were over 150,000 mentally retarded persons residing in state institutions,[2] the potential for future federal court litigation of similar issues is staggering.

Finally, states have a substantial interest in obtaining the clearest and earliest possible guidance on the constitutional issues in order to effectively plan for

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[1] *See, e.g., Simmons v. Thorne*, No. H-80-91 (D. Conn.); *Connecticut Association of Retarded Citizens, Inc., v. Thorne*, No. H-78-653 (D. Conn.); *Illinois Association for Retarded Citizens v. Thompson*, No. 80-C-0914 (N.D. Ill.); *Amy R. v. Thompson*, No. 80-3332 (C.D. Ill.); *Welsch v. Noot*, No. 4-72-451 (D. Minn.) (formerly *Welsch v. Likens*, 550 F.2d 1122 (8th Cir. 1977)); *Smith v. Smith*, No. 79-4129-CV-C (W.D. Mo.); *O'Toole v. Smith*, No. 78-943-Cl (W.D. Mo.); *Goodman v. Parwatikar*, No. 76-1113-C-(1) (E.D. Mo.); *Association of Retarded Citizens of North Dakota v. Link*, No. A1-80-141 (D.N.D.); *New Jersey Association for Retarded Citizens, Inc. v. Klein*, No. 79-1632 (D.N.J.); *Scott v. Plante*, No. 73-1052 (D.N.J.); *Garrity v. Gallen*, C.A. No. 78-116 (D.N.H.); *Barbara C. v. Moritz*, No. C-2-77/-887 (D.C. Ohio); *Henkin v. Department of Social Services*, 78-4088 (D.S.D.); *Washington Association for Retarded Citizens v. Thomas*, No. C-79-1235V (W.D. Wash.); *Medley v. Ginsberg*, C.A. No. 78-2099 CH (S.D.W.Va.).

[2] *See Halderman v. Pennhurst State School and Hospital*, 466 F. Supp. 1295, 1300 n. 7 (E.D. Pa. 1978) (subsequent history deleted).

the provision of services to the mentally retarded in the future. At present, states spend millions of dollars on services to the mentally retarded each year. For state policymakers and administrators to effectively make short and long range plans, it is imperative that states know whether the constitutional standards created in *Romeo* are valid and will, therefore, be applicable elsewhere in the country.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in the petition for writ of certiorari of Duane Youngberg *et al.*[3]

[3] *Amici* are not familiar with any of the events on which Nicholas Romeo asserts liability in this action. Thus, no opinion is taken with respect to his particular situation or conditions generally at Pennhurst.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court Below Raises Significant Questions as to the Scope of Substantive Due Process and the Constitutional Rights of the Mentally Retarded

While this Court has cautioned that courts are poorly equipped to make medical judgments, *Parham v. J. R.*, 442 U.S. 584, 606-09 (1979), the Third Circuit appears to disagree. The new constitutional rights created by the court below would require judges and juries to examine all facets of care of the mentally retarded in institutions to determine if "treatment" is actually being provided, and whether treatment is both acceptable in light of present medical knowledge and the least intrusive under the circumstances. Moreover, the court has somehow determined that any use of restraints is presumptively punitive, slip op. at 13, notwithstanding federal regulations recognizing their use in treatment. 42 C.F.R. §442.438. In light of the present state of medical and scientific knowledge, these are controversies which the federal courts should be slow to enter. *See O'Connor v. Donaldson*, 422 U.S. 563, 577-78 (1975) (Burger, C.J. concurring); *Romeo, supra*, slip op. at 52 (Seitz, C.J., concurring).

Moreover, by this holding, a constitutional malpractice cause of action has been created despite warnings to the contrary from this Court. *See, e.g.*,

Estelle v. Gamble, 429 U.S. 97, 106 (1976).[4] Under the treatment standards pronounced by the Third Circuit, trial of a case involving these issues would be very similar to trial of a state-law malpractice case, with one exception. By requiring defendants to demonstrate "compelling necessity" for use of restraints, "substantial reasons" for any attacks on residents, and use of the "least intrusive treatment available under the circumstances", slip op. at 41-42, the burden of proof has been largely shifted to the defendants. Thus, the court has created what amounts to strict liability in constitutional law.

Finally, the specific rights and standards developed by the Third Circuit are, in various respects, overlapping, inconsistent and contrary to this Court's analysis in recent cases. The conflicting nature of these rights is perhaps best illustrated by attempting to determine where one resident's right to be free of restraints and to receive the least intrusive treatment available ends and another patient's right to be protected from harm begins. As to the use of a "compelling necessity" standard in evaluating the use of restraints, this approach appears to be inconsistent with this Court's rejection of such an approach in *Bell v. Wolfish*, 441 U.S. 520 (1979) (evaluation of conditions of pre-trial detention).

In sum, serious questions as to the scope of due process under the Fourteenth Amendment have been

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[4] A related issue—whether simple negligence can form the basis of an action under 42 U.S.C. §1983—is presently before the Court. *Parratt v. Taylor*, No. 79-1734, *cert. granted*, 101 S.Ct. 315 (1980).

raised by the decision in *Romeo*. While *Amici* do not attempt in this brief to articulate what standards should be applied in these circumstances, these questions can best be explored by this Court reviewing the *Romeo* decision.

II. The Decision of the Court Below Creates Problems for All States in Planning and Providing Services to the Mentally Retarded

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The uncertainty created by the *Romeo* decision affects every facet of provision of services to the mentally retarded. For example, difficulties can be expected in recruiting top-notch professionals to work in state institutions in light of the possibility of monetary liability under the Third Circuit's standards. Moreover, budgeting the amount of money necessary to provide services under the *Romeo* standards will become a very speculative endeavor. In his concurring opinion in *Romeo*, Judge Aldisert cogently addressed the problems raised by the majority's decision:

> It has been almost twenty years since I faced a client across a law office desk. But were I to be placed in that position today, my advice would probably go like this: if you are contemplating a position as an attendant in a mental hospital, seek another job; there is simply too much unpredictability in the law governing your conduct. If you are a physician, make certain that the state's malpractice insurance policy includes a clause protecting you from the new 'constitutional torts' manufactured today by the Third Circuit Court of

> Appeals. If you are an insurance carrier, set your premiums high, anticipating fully and completely the open-ended notions of 'substantial' and 'compelling' necessity and 'least intrusive treatment.' If you are a governor or state legislator, cut back and retrench institutional programs for the mentally retarded, because the potential for lawsuits has now increased geometrically, with corresponding demands on the tax base to support the costs. If you are a parent with a retarded child, I simply feel sorry for you. The sincere effort to provide financial relief for personal injuries suffered by retarded persons has been accomplished at an enormous social cost. In striking the balance between how seriously the complainants are being hurt and how much it will cost to afford them more relief than is presently available under state tort law, the balance has been struck so vaguely that state institutional programs, already diminishing, will be curtailed further. Given the recent political currents, there simply are not, and will not be, sufficient tax dollars, state or federal, to give the defendants adequate financial protection to meet the illusory standards promulgated today.

Slip op. at 68.

III. Litigation Pending in Other States Would Benefit From an Early Ruling on the Issues Addressed by the Court Below

At present, there are inconsistent and varying adjudications with respect to the constitutionally and statutorily mandated requirements which a state must meet in providing services to the mentally retarded. *See, e.g., Scott v. Plante*, Nos. 80-1314/1315, 80-1596 (3d Cir., filed Feb. 5, 1981); *Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978); *Morales v. Turman*, 562 F.2d 993 (5th Cir. 1977), *rev'd and rem'd on other grounds*, 430 U.S. 322 (1977) (*per curiam*); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). By the decision in *Romeo*, more uncertainty has been added to this frequently-litigated area of the law. As a result, costly, complex, class-action litigation on these issues will continue and states will be hampered in their planning for the delivery of services to the mentally retarded or developmentally disabled.

Thus, all states would directly benefit by a definitive statement from this Court as to the requirements to be imposed on them under the Constitution and as to the relationship between those obligations and their obligations and duties under the Developmentally Disabled Assistance and Bill of Rights Act.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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MOTION FILED
APR 24 1981

No. 80-1429

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

DUANE YOUNGBERG, *et al.*,
Petitioners
v.
NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE AND MEMORANDUM OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of this Court, the American Psychiatric Association ("APA") submits this motion to file a memorandum as *amicus curiae*. Petitioners have consented to the filing of this brief (Appendix A); respondent has refused consent.

As noted in "Interest of Amicus Curiae," the APA has participated in numerous cases involving mental health issues. See *Pennhurst State School and Hospital* v. *Halderman*, Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489, decided April 20, 1981; *Parham* v. *J.R.*, 442

U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). These cases have presented troublesome questions regarding the extent of state obligations towards the mentally-ill (*O'Connor; Addington; Parham*) and the mentally-retarded (*Pennhurst*). In its submissions, the APA has sought to assist the Court in developing legal doctrines that promote, rather than hinder, efforts to improve the quality of care and treatment for the mentally-ill and mentally-retarded.

The decision of the Third Circuit in the present case authorizes a substantial intrusion by the federal courts into medical decisions. Certain forms of treatment, for example, may be permitted only if shown to be the least restrictive form of treatment available, even though they may be the most desirable methods of treatment from a medical standpoint. Other treatment decisions, mistakenly supposed by the court of appeals to involve purely legal questions, must be justified by showings of compelling or substantial necessity. In addition, the decision below may well drive needed doctors and employees from state facilities because they are subject to damages for institutional inadequacies that they cannot correct. The APA believes that it can supply particular insight, not fully provided by the parties, into the practical and medical realities inherent in the care and treatment of the mentally-retarded.

The development of constitutional standards for care of the mentally-retarded involves a complex balancing process in which medical issues necessarily play a prominent role. Psychiatrists have major responsibility in the development of programs for the mentally-retarded, and many psychiatrists are employed at state and local facilities. The APA believes, therefore, that this Court will benefit from its views as well as the views of advocates for the mentally-retarded and of state officials.

APPENDIX

[EMBLEM]

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No. 80-1429 (U.S. S.Ct.)

Dear Joel:

It is my understanding that you are preparing, on behalf of the American Psychiatric Association, a brief in support of the grant of a writ of certiorari in the above-captioned case. Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, please be advised that petitioners consent to the filing of such a brief.

For your information, I am also enclosing a copy of our petition (without appendix) and a draft of the brief of other states in support of the grant of certiorari in this case.

Sincerely,

/s/ David H. Allshouse
DAVID H. ALLSHOUSE
Deputy Attorney General

DHA/esm
Enclosures

It is therefore respectfully submitted that this motion to file a memorandum as *amicus curiae* should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1429

DUANE YOUNGBERG, *et al.*,
Petitioners

v.

NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Psychiatric Association (APA) was founded in 1844 and is the Nation's largest organization of qualified doctors of medicine specializing in psychiatry. Twenty-six thousand of the Nation's approximately 33,000 psychiatrists are members. Psychiatrists bear a major responsibility for evaluating, developing programs for, and caring for the mentally-ill and the mentally-retarded.

The APA has previously participated as *amicus curiae* in numerous cases involving mental health issues. See

Pennhurst State School and Hospital v. *Halderman*, Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489, decided April 20, 1981; *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). The present case involves significant issues regarding care of, and responsibility for, the mentally-retarded, including the establishment of constitutional standards for treatment and the likely imposition of personal liability on individuals unable to correct institutional inadequacies. The APA believes that its clinical experience and insight concerning the mentally-retarded can assist the Court in addressing the important issues in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below announces novel and complex constitutional doctrines governing care and treatment of the mentally-retarded. Under the rubric of substantive due process, the Third Circuit has devised varying standards that state employees must satisfy in making judgments about use of physical restraints, in protecting against injuries by and to residents, and in developing individual treatment programs. At the same time, the court has made clear that state officials will be liable for failure to meet those standards even though the default resulted from institutional inadequacies beyond their control. Although the court of appeals appears to have acted from a genuine concern for the mentally-retarded, we believe that its decision may ultimately do more harm than good. At the very least, this Court should grant review to resolve these troublesome issues.[1]

[1] The issues in this case are left open by *Pennhurst State School and Hospital* v. *Halderman*, —— U.S.L.W. —— (April 20, 1981). Although the Third Circuit made frequent references in the opinion below to its earlier opinion in *Pennhurst*, see, e.g., Pet. App. at 3a n.1, 9a n.10, 10a-11a n.12, 37a n.55, it appears that the constitutional holdings below stand independent of the statutory

The potential mischief of the decision below stems from two different aspects. First, it demonstrates that the Due Process Clause is an unreliable text in which to divine constitutional guidelines for treatment of the mentally-retarded. Left largely to its own devices, the Third Circuit not only has placed the federal courts squarely in the middle of individualized treatment decisions, it has needlessly inhibited discretion by insisting that certain decisions be made in certain ways, despite the existence of other acceptable treatments. Pages 3-12 *infra*.[2] Second, the decision makes individuals liable for institutional failings beyond their control. Whatever past abuses may have been, it is unfair to impose liability on persons without fault simply because they, unlike the states for which they work, have no absolute immunity from suit. Pages 12-15 *infra*.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE SUBSTANTIVE DUE PROCESS STANDARDS IMPOSED ON STATE INSTITUTIONS.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." In reliance upon that general language, the Third Circuit has seen fit to establish substantive criteria to govern the operation of state facilities for the mentally-retarded, directing state officials to apply multifarious standards according to whether restraint, protection, or treatment

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holdings in *Pennhurst*. A remand for reconsideration in light of *Pennhurst*, therefore, would not appear to be appropriate.

[2] The limitations on professional discretion imposed in this case are closely related to issues involving the right to refuse treatment, which are presently before this Court. *Okin* v. *Rogers*, No. 80-1417, certiorari granted, April 20, 1981.

is involved. The result is that medical judgments must now be tempered, and in some instances displaced, by judicial opinions regarding desirable care. In our view, that degree of judicial oversight is neither required by the Constitution nor desirable as a method of upgrading state programs.

1. This Court has previously recognized that courts have no special expertise in medical matters. See *Parham* v. *J.R.*, 442 U.S. 584, 606-609 (1979). Notwithstanding that fact, it is understandable that courts, confronted by signs of social default in the case of mentally-retarded persons, will reach out to improve conditions by whatever means are at hand. Cf. *Bell* v. *Wolfish*, 441 U.S. 520 (1979). The fact remains, however, that the wrong effort is often worse than no effort at all. It does not help the mentally-retarded when principles of law and medicine are out of joint. See generally *Addington* v. *Texas*, 441 U.S. 418 (1979).

The Due Process Clause is, at best, an awkward starting point for the revision of state medical programs. Because the Clause was aimed at very different problems, neither its language nor its history sheds any real light on state obligations in this complex, troublesome area. Nor is it possible to extrapolate these obligations from due process decisions in other areas, where the emphasis has been principally on assuring procedural safeguards rather than on limiting the substantive judgments to be made by the decision-maker. See *Addington* v. *Texas*, *supra*; *Parham* v. *J.R.*, *supra*. As a consequence, the federal courts are asked to make sensitive judgments virtually without guidance and, correspondingly, virtually without restraint.

This freedom leads to two unfortunate tendencies. First, the courts naturally turn for guidance towards doctrines developed in other contexts, like tort law, a

process that blurs meaningful distinctions between constitutional wrongs and other grievances.[3] Indeed, the court below has made it easier in some instances to plead a constitutional claim than a malpractice claim.[4] Second, the courts tend to use the few Due Process principles at hand, like the idea of a least restrictive alternative, even though they have limited utility in the particular situation. There is no reason to conclude, for example, that the least restrictive treatment is better at all times for every mentally-retarded person, even assuming that it were possible to determine what that treatment might be.

Although the Third Circuit in this case makes a conspicuous effort to separate legal and medical doctrines, the attempt is ultimately unsuccessful. For example, it is fanciful to distinguish the shackling and protection issues, described by the court as "undiluted legal concerns," from the treatment issues, said to "entail[] mixed questions of law and medical judgment." Pet. App. 14a. Decisions about restraints and exposure to other residents, matters directly involving the risks and benefits of freedom and social interaction, are frequently made in the context of an overall treatment program. See Rosen *et al.*, *The Role of Physical Restraint in the Treatment of Psychiatric Illness*, 39 J. Clin. Psychiat. 228 (1978); Bursten, *Using Mechanical Restraints on*

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[3] Reviewing a civil rights claim protesting inadequate medical care to a state prisoner, this Court has noted: "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). Similarly, the mere fact of residence in a state facility should not convert all state torts into due process claims.

[4] In general, a physician is liable for malpractice only if the care provided falls below the level of acceptable treatment. Under the decision below, however, a physician may be liable for a constitutional tort even though his treatment is professionally acceptable if it is not also the least restrictive treatment available.

Acutely Disturbed Psychiatric Patients, 26 Hosp. & Comm. Psychiat. 757 (1975); Soloff, *Physical Restraint and the Nonpsychotic Patient: Clinical and Legal Perspectives*, 40 J. Clin. Psychiat. 302 (1979). Indeed, the court itself recognized (without any apparent effect) that restraints may be part of an acceptable form of therapy, Pet. App. 20a n. 29, and that it may be "therapeutically more desirable to have an admittedly aggressive patient mingling with others instead of confined to an isolated cell." Pet. App. 26a n. 38. See discussion of this issue in Gutheil, *Restraint Versus Treatment: Seclusion as Discussed in the Boston State Hospital Case*, 137 Am. J. Psychiat. 718 (1980); Gair, *Limit-Setting and Seclusion in the Psychiatric Hospital*, Psychiat. Opinion 15 (Feb. 1980); Gutheil, *Observations on the Theoretical Bases for Seclusion of the Psychiatric Inpatient*, 135 J. Am. Psychiat. 325 (1978); Soloff, *Behavioral Precipitants of Restraint in the Modern Milieu*, 19 Comprehen. Psychiat. 179 (1978); Plutchik *et al.*, *Toward a Rationale for the Seclusion Process*, 166 J. Nervous & Mental Disease 571 (1978). Despite these observations, the court confidently preempts state decision-making in the belief that restraint and protection involve "purely legal issue[s]." Pet. App. 27a.

This beguiling illusion leads to far too rigid a constitutional doctrine. Thus, for example, with regard to shackling of any sort (and apparently for any duration), the court requires both that it be justified by compelling necessity and that it be the least restrictive means of handling the resident. Pet. App. 18a. The court does not explain, and perhaps could not explain, how the term "least restrictive" is to be applied in medical terms where possible restraints may include isolation or a variety of medications, as well as the restraints used here. See Hoffman *et al.*, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 S. Diego L. Rev. 1100 (1977); Perr, *The Most Beneficial*

Alternative: A Counterpoint to the Least Restrictive Alternative, VI Bull. of Am. Ac. of Psychiat. and the Law, No. 4, iv (1978); Bachrach, *Is The Least Restrictive Alternative Always the Best? Sociological and Semantic Implications*, 31 Hosp. & Comm. Psychiat. 97 (1980); Appelbaum, *Least Restrictive Environment: Some Comments, Amplification*, 31 Hosp. & Comm. Psychiat. 420 (1980).[5] Turning to protection, the court changes its tack to require substantial (rather than compelling) reasons to justify the level of risk, suggesting that this standard will "enable[] a court and jury to distinguish between isolated incidents and inadvertent accidents, on the one hand, and persistent disregard of patients' needs, on the other." Pet. App. 25a. Even leaving aside the fact that some isolated incidents are far more injurious than repetitive minor incidents, it is not all clear why substantial necessity rather than acceptable medical judgment is the constitutional minimum.[6]

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[5] Although the notion of a least restrictive treatment is superficially enticing, the concept in practice may be almost unworkable. To begin with, it is extremely difficult to tell whether confinement to a room, for example, is more or less restrictive than administration of a drug that permits the resident to remain with other residents in a group situation. The difficulty is made worse by the fact that some treatments may be more intensive but of shorter duration, forcing doctors to balance the "restrictiveness" of a short-term treatment imposing substantial restraints against a longer course of treatment with less restraints. Furthermore, the lessening of restrictions for one resident may lead to an increase in restrictions on other residents. To determine a single supposed least restrictive treatment for each resident from this complex of variables is beyond the power of most doctors and, we suspect, most judges as well.

[6] The mistaken belief that shackling and protection raise purely legal issues also encourages the court to adopt shifting tiers of review depending on the type of decision involved. These differing standards only make the task of reaching professional judgments

The court is on even more slippery ground in defining the constitutional standards for treatment. While the court allows some decisions to be justified as "acceptable . . . in light of present medical or other scientific knowledge," Pet. App. 38a, a standard that appears largely indistinguishable from state tort standards, it directs that any decision involving "significant deprivations of liberty" be tolerated only if it "provided for the least intrusive treatment available under the circumstances." Pet. App. 47a. Although this Court has admonished that "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments," *Parham* v. *J.R.*, *supra*, 442 U.S. at 607, the court of appeals is thus forcing state physicians to choose a particular mode of treatment (determined after the fact according to an ephemeral "least intrusive" standard) even though another form of treatment would be acceptable or even preferable from a medical standpoint. Indeed, under this doctrine, doctors seemingly will be liable for constitutional torts where they would not be liable for malpractice under state law. See note 4 *supra*.

This curious result is apparently quite intentional. Without identifying any medical basis for its view, the Third Circuit has adopted a principle that treatment in state facilities must be risk-averse. Noting that individuals are usually allowed to err on the side of risk, the court nonetheless declares that "[w]hen the state is the decision-maker, the converse would seem appropriate: such actions should err on the side of safety." Pet. App. 32a n. 45. Although safety considerations are part of

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more uncertain. It is hard enough to know what conduct is required under any particular standard; it is doubly hard to know what standard is to be applied in any particular case.

any medical judgment,[7] the decision below thus forces physicians to elect only the safest treatment for state residents even though more effective treatments would be followed for other retarded persons.[8] The record of a single action for damages is not an adequate basis for so fundamental a reordering of state treatment programs.

It is important to keep in mind that the issue here is not procedural but substantive. Compare *Addington* v. *Texas*, *supra*; *Vitek* v. *Jones*, 100 S.Ct. 1254 (1980); *Parham* v. *J.R.*, *supra*. Whereas procedural due process assures that the decision-maker has an adequate and timely base of information on which to decide, and generally requires that the resulting decision not be arbitrary or capricious, the substantive due process requirements laid down by the Third Circuit compel a particular decision in most cases, even though a different decision would be neither arbitrary nor capricious.

The entry of federal courts into this field has important implications. Although this Court has made clear that states cannot commit individuals, or move them from prisons to hospitals, without extending some form of procedural due process, *Addington* v. *Texas*, *supra*; *Vitek* v. *Jones*, *supra*, it has not yet tackled the states on the

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[7] "In determining the most beneficial alternative for a given patient, consideration of the least restrictive setting is certainly appropriate, but it is one of many factors which should include likelihood of success in altering the course of mental illness and the likelihood of preventing the chronicity which so many recent policies actually seem to encourage." Perr, *The Most Beneficial Alternative: A Counterpoint to the Least Restrictive Alternative*, IV Bull of Am. Ac. of Psychiat & the Law No. 4, iv, vii (1978).

[8] Indeed, the use of the most cautious treatment may extend the length of a resident's stay in a state facility, thus increasing the loss of liberty involved in the initial commitment. While such treatment may well be appropriate in individual cases, the Third Circuit has written that requirement into the Constitution with little evident awareness of the competing interests involved.

particular substantive standards to be applied in each case. Yet, if a state must choose the "least restrictive" method of treatment for a patient admitted to a mental facility, on the ground that other methods needlessly encroach upon an incremental liberty interest, it may follow that a state cannot proceed with involuntary commitments at all except upon a showing that confinement itself is the least restrictive method of dealing with the mental condition in question. A state obviously would be hard pressed to provide care and treatment for all mentally-retarded persons without confinement of some sort, but the Third Circuit has also said quite plainly that "except in emergency situations, inadequate resources or administrative rationales offer an insufficient basis for intrusions [like shackling] on a fundamental liberty interest." Pet. App. 18a. Carried to its logical conclusion, therefore, this approach could prevent confinement of mentally-ill or mentally-retarded persons at all, unless the state could show that no other less restrictive care and treatment was available regardless of cost or feasibility. These requirements would be difficult, if not impossible, for states to meet.

We also question the theory that the provision of acceptable medical treatment within an institution may nonetheless violate the liberty interests of its residents. It is not unreasonable to suppose that a broad range of permissible treatment and restriction, left largely to the professional discretion of the staff, is inherent in the original commitment to a state facility. Indeed, the due process safeguards preceding admission are intended to insure that these significant limitations are imposed only in proper cases. See *Addington* v. *Texas*, *supra*. Once admission has been legally authorized, however, it also stands to reason that conduct within that permissible, anticipated range does not amount to a constitutional violation. Under this view, only conduct falling well below the acceptable standards, either because of the

unusual severity of a particular isolated occurrence or because of a more systematic, repetitive abuse of basic standards, would support a civil rights action. See Pet. App. at 48a *et seq.* (concurring opinion) ("substantial departure from accepted professional judgment, practice, or standard"). Traditional complaints of assault or malpractice would remain the province of state law.

Such analysis would seem to have practical, as well as conceptual, advantages. First, it avoids the necessity for a graduated system of liberties, whereby commitment invades one set and various acts of treatment or temporary confinement invade another. Second, it provides a reasonable dividing line between ordinary torts and constitutional violations, putting the second class on more serious footing. See note 4 *supra*. Thus, where a complaint alleges only a modest, individual grievance, it may properly be dismissed for failure to state a civil rights claim. Third, it removes the federal courts from the day-to-day, instance-by-instance administrative determinations that are at the heart of operating a state hospital. The result should be to focus attention where it belongs: on serious abuses that are intolerable in a humane society.

These issues are clearly important. Moreover, like many issues in the field of mental illness and retardation, they have a sense of immediacy that argues in favor of prompt review. State employees within the Third Circuit must now work under the standards imposed by the court of appeals and are subject to damages for failure to make the complicated judgments required of them by the decision below. The result, we believe, may be to impair effective treatment as overly-cautious state employees opt for the safest, though not necessarily the most beneficial, approaches to treatment. In addition, the Third Circuit has continued to follow the policy of linkage begun with *Halderman* v. *Pennhurst State School & Hospital*, 612

F. 2d 84 (1979) (en banc), reversed and remanded —— U.S.L.W. —— (April 20, 1981), applying the principles of this case to the treatment of the mentally-ill in *Scott* v. *Plante*, Nos. 80-1314, 80-1315, and 80-1596 (February 5, 1981), cert. petition pending, No. 80-1699. We, therefore, urge this Court to consider these sensitive issues now.

II. THIS CASE RAISES IMPORTANT QUESTIONS REGARDING THE IMPOSITION OF LIABILITY WITHOUT FAULT FOR CONSTITUTIONAL TORTS.

The decision below also raises a substantial risk that state employees will be held liable for constitutional violations over which they have little or no control. It is an unfortunate fact that many state employees work at institutions that are understaffed or lack adequate facilities. As a result, they may provide care and treatment that falls below acceptable standards, subjecting them to personal liability in damages. This exposure is fundamentally unfair.

In many instances, it is no more just to hold a particular doctor or attendant liable in damages than it is to shoot a messenger bearing bad news. Too often, the employees of a state institution are victims of the same shortcomings as are the patients. They cannot provide a proper level of care, not because they are malicious or insensitive, but because they do not have enough time or the right facilities. Judged under the usual standard for qualified immunity, they may in fact realize that they are providing substandard care but, as individuals, be helpless to do otherwise. The choices thus are severe: to do the best they can; to release the patients (if state law allows), leaving them without care at all; or to resign their positions, making inadequate staffing worse. Unfortunately, perhaps the best choice—to do all that can be done with the resources at hand—

is the choice that confronts them with personal liability for defects beyond their control.

The inequity in this situation arises from several sources. In one sense, of course, it stems simply from efforts to find a defendant to hold liable for violations of constitutional standards. Sovereign immunity shields the states from liability in damages for past wrongs, although they may be compelled to corrective action in the future. *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Thus, the courts must make do with whomever they can get before them, typically the individuals responsible for carrying out state efforts.

The problem is compounded by the awkward distinction between affirmative conduct and inaction. When government officials have taken affirmative action to deny someone his constitutional rights, by initiating an unlawful search or seizure or by ordering or participating in a physical attack, it is a relatively straightforward matter to identify the persons at fault. See, e.g., *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). Implicit in this theory, however, is the idea of choice: that the defendant had an opportunity to respect constitutional rights and did not. Inaction often does not involve the same choice. Where steps must be taken to implement constitutional rights, there must be some recognition of the fact that a particular defendant cannot always take those steps himself.

The issue is one not of the wrong itself, but of responsibility for it. Unlike malpractice standards, which vary according to circumstances, it is not desirable to vary substantive constitutional standards to suit the conditions faced by a particular defendant.[9] But it is

[9] For example, a doctor performing a roadside operation cannot be expected to perform exactly as he would in a hospital operating room. Thus, the standard of care required is varied to suit the

important to assure that the failure to meet the proper standards does not impose liability on persons who have no choice in the matter. Judicially-created doctrines of liability and qualified immunity, as they apply in cases like the present one, appear to do just that.

Although the Third Circuit recognizes a defense of good-faith immunity in these cases, the definition of that immunity appears to give insufficient protection. Under that definition, a state official or employee is entitled to immunity only "if the official or employee was not aware, or had no reason to be aware, of such [constitutional] rights." Pet. App. 43a. See also *Scheuer* v. *Rhodes*, *supra*; *Wood* v. *Strickland*, 420 U.S. 308 (1975). But it is entirely possible, even likely, that state employees in mental hospitals or similar facilities may be acutely aware of their failure to meet constitutional standards but, at the same time, simply have no capacity to do much better. For example, a state psychiatrist may have so large a caseload that he can give only cursory time to any particular patient, a problem that he cannot solve on his own. It will hardly help matters to hold him liable for damages or force him to resign.

One solution is simply to recognize that the immunity defense encompasses not only ignorance of constitutional standards, but good-faith efforts to meet them. Whatever the law may require of state or federal governments, it makes little sense to insist, at pain of damages, that individuals do more than they possibly can do. At best, such a doctrine exacts relief from the wrong party; at worst, it will drive needed state employees to other jobs,

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particular conditions. Where a state is responsible for inadequate conditions, however, it would be self-defeating to lower the constitutional standard itself because plaintiffs then would be prevented from obtaining the injunctive relief needed to improve the conditions.

further damaging the very institutions that plaintiffs seek to improve.[10]

Another solution is to acknowledge that recovery for constitutional torts must depend upon a showing of fault. To impose liability on a particular defendant, it is not enough simply that the plaintiff have suffered injury: he must seek relief against the proper party. If the injury is caused by a lack of resources or personnel, it is likely to be the governmental entity itself, not the individual who works for it, which is responsible. The fact that the State has absolute liability is not a reason to pretend otherwise.

These concerns about individual liability are not illusory. In a subsequent decision, relying heavily on the decision in this case, the Third Circuit has indicated that good-faith efforts to protect constitutional rights might provide a defense to claims for *punitive* damages, but quite plainly not compensatory damages. *Scott* v. *Plante*, *supra*, slip op. at 36. We submit, therefore, that review is necessary to consider not only the substantive standards established by the court of appeals, but also the extent of liability imposed on individuals for failure to meet them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] It is already difficult, for example, to get good psychiatrists to work in state hospitals. See generally, Note, *Psychiatry in the Public Sector*, 80 Hosp. & Comm. Psychiat. 749 *et seq.* (1979).

Office-Supreme Court, U.S.
FILED
JUL 31 1981
CLERK

No. 80-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. When a state has decided to provide care—food, shelter, clothing, reasonable safety and medical care—to a severely mentally retarded individual in an institutional setting, does it thereby assume the burden, as a matter of substantive due process, (1) to provide treatment to that person which is acceptable in light of present medical or other scientific knowledge and the least intrusive available under the circumstances; (2) to refrain from any use of restraints on him, absent a showing of "compelling necessity;" and (3) to protect him from harm, however caused, absent a showing of "substantial necessity?"

2. When a court of appeals creates new constitutional rights in considering a claim for damages under 42 U.S.C. § 1983, and the record at trial contains no evidence of malice or intent to injure by the defendants, should the claim be dismissed on qualified immunity grounds as a matter of law?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1429

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 644 F.2d 147 (Pet.

App. 1a).[1] The judgment of the District Court (J.A. 83a) and its opinion on defendants' motion to dismiss (Pet. App. 79a) were not reported.

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision on November 24, 1980. Petitioners filed their petition for writ of certiorari on February 23, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 and Section 406(a) of Pennsylvania's Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § 4406. The relevant portions of these provisions are reproduced in the petition for writ of certiorari (Pet. 2-3).

STATEMENT OF THE CASE

This is an action under 42 U.S.C. § 1983, which was commenced in the United States District Court for the Eastern District of Pennsylvania in 1976, on behalf of Nicholas Romeo, a resident of Pennsylvania's Pennhurst State School and Hospital.[2] The suit was brought seeking damages against three supervisory employees at Pennhurst challenging certain conditions that allegedly existed there. After trial, a jury verdict was rendered

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[1] The following abbreviations will be used hereinafter: "Pet. App."—Appendix to the Petition for Writ of Certiorari; "Pet."—Petition for Writ of Certiorari; "J.A."—Joint Appendix; "R."—Notes of Testimony; and "D. Ex."—Defendants' Exhibit.

[2] Pennhurst is a state-operated institution for the mentally retarded. It was the focus of *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531 (1981).

in favor of the defendants. The Third Circuit vacated and remanded the case for a new trial.

Nicholas Romeo is a profoundly retarded, 33 year-old man. He lived with, and was cared for, by his parents until his father died in May 1974 (R. 1-31). Twelve days later, Romeo was admitted to Pennsylvania Hospital Community Mental Health and Retardation Center, a community-based facility, suffering from multiple bruises and lacerations which were self-inflicted by banging against walls and other objects (D. Ex. 12; R. 7-69-70, 73). While there, Romeo required constant nursing care and occasional wrist and ankle restraints. *Id.*

In May of 1974, Romeo's mother initiated commitment proceedings by filing a petition with the Court of Common Pleas of Philadelphia County. She averred that she was unable to care for him because of his propensity for violence, and requested that he be committed to Pennhurst (J.A. 18a; R. 7-84). As part of the commitment process, Romeo was examined by a physician and by a psychologist (J.A. 21a, 28a). These professionals corroborated both Romeo's self-destructive tendencies and his inability to care for himself (J.A. 22a, 29a). On June 11, 1974, the Pennsylvania court granted his mother's petition and ordered Romeo committed to Pennhurst pursuant to state law (J.A. 32a; R. 7-85).

Between June, 1974 and November, 1976, when this action was filed, Romeo received medical care on a regular basis as well as a variety of treatment programs intended to curb his aggressive behavior and reinforce his self-help skills (R. 5-44-56, 242-50).[3] In addition,

[3] Following his admission to Pennhurst, Romeo underwent an admission physical examination (R. 4-152), and thereafter continued to receive medical care on a regular basis (R. 4-158). In addition, he underwent testing to determine his level of functioning and to evaluate the progress of the treatment which he was receiving at Pennhurst (R. 5-18-26). One purpose of this testing and

other treatment programs were designed for Romeo but never provided only because of his mother's objections (R. 1-52-53; 5-31, 56, 237-39).

In November, 1976, Romeo's mother, filed this action on his behalf. The original complaint sought damages and injunctive relief from three of Pennhurst's supervisory officials,[4] who allegedly knew that Romeo had suffered injuries and failed to create procedures which would have prevented them from occurring. These institutional conditions allegedly violated Romeo's rights under the Eighth and Fourteenth Amendments.

In late 1977, Romeo was transferred from the ward to the infirmary at Pennhurst after sustaining an injury (Pet. App. 89a). While in the infirmary he continued to receive treatment (R. 5-237). Shortly thereafter, Romeo filed a second amended complaint alleging that defendants had kept him physically restrained to a bed or chair in the infirmary for long periods of time each day (Pet. App. 86a-92a). Romeo also sought damages, for the first time, for defendants' alleged failure to

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the various treatment programs provided to Romeo was to eliminate his aggressive behavior toward other residents and thereby reduce the number of injuries sustained from their retaliatory conduct (R. 5-26). Another purpose was to reinforce and promote development of Romeo's self-help skills, such as toileting, showering and dressing (R. 5-44-56).

Moreover, in February of 1976, the ward team responsible for the care and treatment of Romeo met and developed a comprehensive program of behavorial modification which they proposed to implement for Romeo (R. 5-229). Again, one purpose of this behavorial modification program was to protect him from injury (R. 5-235). This program was never placed into effect because Romeo's mother, refused to approve it (R. 5-56, 237-39).

[4] Defendants are Duane Youngberg, then Superintendant at Pennhurst, Richard Matthew, then Director of Resident Life, and Marguerite Conley, Director of Romeo's unit. Youngberg and Matthew are no longer at Pennhurst.

provide him with appropriate treatment throughout his stay at Pennhurst. Injunctive relief was also sought in this pleading but was withdrawn prior to trial.

An eight day jury trial was held in April of 1978. At trial, the District Court denied a jury instruction proposed by Romeo asserting that he had: (1) a right to "such treatment as will afford [him] a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit" (Pet. App. 94a-95a) and (2) a right to treatment "under the least restrictive conditions consistent with the purpose of the commitment" (Pet. App. 95a). In so doing, he noted that "this is not a malpractice suit" (J.A. 48a).[5]

Rather, the District Court instructed the jury, as requested by Romeo (Pet. App. 93a), that "if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo," such failure deprived him of constitutional rights (J.A. 73a). The jury was also instructed that if defendants caused Romeo to be shackled other than in a good faith effort to treat him, then his rights were violated (J.A. 73a). Finally, the jury was instructed that if Romeo was denied programs "as a punishment for filing this lawsuit," or if defendants were "deliber-

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[5] The District Court had previously refused, on similar grounds, to permit plaintiff to present the testimony of two experts who, according to plaintiff, would have testified that plaintiff's treatment programs at Pennhurst were inappropriate and that his injuries were the result of the failure to provide more appropriate treatment (Pet. App. 97a-101a, 102a-104a). Plaintiff also represented that one of those experts would have testified that, while restraints are a proper mode of treatment in some cases, they were used improperly in plaintiff's case. The District Court excluded the testimony, ruling that, while it might be relevant to an issue of malpractice, it had no relevance to the constitutional claims (Pet. App. 101a, 105a, 109a).

ately indifferent to the medical and psychological needs of Nicholas Romeo," his constitutional rights were violated (J.A. 73a-74a).[6] The trial judge based his charge on the Eighth Amendment (J.A. 73a-75a).[7]

The jury returned a verdict for all defendants.

On appeal, the Third Circuit vacated the judgment of the District Court and remanded for a new trial. 644 F.2d 147 (Pet. App. 1a). All of the judges agreed that the Eighth Amendment was inapplicable and the expert testimony should have been admitted. However, the court was sharply divided, five-to-four, as to the nature of the substantive due process rights of the institutionalized mentally retarded. *Id.*

The majority found that the Fourteenth Amendment generated three separate areas of constitutional rights: (1) a tri-partite right to treatment, (2) a right against undue bodily restraint and (3) a right to protection from harm and personal security. *Id.* at 159 (Pet. App. 14a).

As to the treatment rights, the majority held that all institutionalized mentally retarded persons are categorically entitled to treatment unless there is a "compelling explanation" for the failure to provide it. *Id.* at 173 (Pet. App. 47a). Once some treatment is pro-

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[6] A standard good faith immunity charge was also given (J.A. 76a-77a).

[7] The complaint and points for charge submitted by plaintiff assert liability based on the Eighth and Fourteenth Amendments (Pet. App. 93a-96a). The District Court obviously construed the claims as arising solely under the Eighth Amendment as made applicable to the states under the Fourteenth Amendment. *See* opinion on motion to dismiss (J.A. 79a-84a); charge to the jury (J.A. 71a-75a). The Court of Appeals disagreed. While recognizing plaintiff's failure to assert clearly the Fourteenth Amendment as a separate legal basis for relief, the Third Circuit construed the complaint as asserting substantive due process claims. 644 F.2d at 155 n.2 (Pet. App. 6a).

vided, the Fourteenth Amendment requires that it be "acceptable . . . in light of present medical or other scientific knowledge." *Id.* at 169, 173 (Pet. App. 38a, 47a). The majority also held that defendants must demonstrate "a relationship between the treatment administered and the plaintiff's needs, even if the treatment is arguably regarded as acceptable in other situations." *Id.* at 173 (Pet. App. 47a). A third level of constitutional treatment rights arises, according to the majority, where "severe intrusions on individual dignity," or "a significant loss of individual liberty is involved." *Id.* at 166, 173 (Pet. App. 30a, 47a). In those instances, an institutionalized mentally retarded person is entitled to "the least intrusive treatment available under the circumstances." *Id.* at 173, 166 (Pet. App. 47a, 31a-32a).

With respect to the conditions of confinement in institutions, the Third Circuit majority held that the mentally retarded have a constitutional right to be free of physical restraints unless justified by a showing of "compelling necessity"—by defendants' proving at trial that they were necessary to protect or treat the resident. *Id.* at 160 (Pet. App. 18a). Moreover, defendants must also establish that the restraints used were "the least restrictive method of dealing with the patient, in light of his problems and the surrounding environment." *Id.* at 161 (footnote omitted) (Pet. App. 18a-19a). The majority also found a constitutional right to personal security or to protection from harm by other residents of the institution absent a showing of "substantial necessity" by defendants. *Id.* at 164 (Pet. App. 25a).

With respect to the issue of whether defendants were immune from liability for damages, the majority deferred ruling on this question until a jury was given the opportunity on remand to determine the "possibility of immunity." *Id.* at 172 (Pet. App. 43a).

The concurring judges disagreed sharply with the majority's conclusions concerning the constitutional rights of the retarded. Chief Judge Seitz, in an opinion joined in by the other three concurring judges, concluded that the majority had erred in establishing its "multilevel standards" and that a unitary standard should be applied instead. *Id.* at 175 (Pet. App. 52a). Moreover, he found the standards applied by the majority unnecessarily strict and, in many ways, indistinguishable from malpractice. *Id.* at 177 (Pet. App. 56a). According to Chief Judge Seitz, the proper standard for evaluating defendants' conduct was whether there was "such a substantial departure from accepted professional judgment, practice or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment." *Id.* at 178 (Pet. App. 59a). The constitution, he concluded, "only requires that the courts make certain that professional judgment in fact was exercised." *Id.* at 178 (Pet. App. 58a).

Defendants filed a petition for writ of certiorari on February 23, 1981. Thirty-five states and the American Psychiatric Association filed *amici curiae* briefs urging the Court to grant the writ. Certiorari was granted on May 18, 1981.

SUMMARY OF ARGUMENT

Plaintiff was properly committed to a state institution for the mentally retarded because he was unable to satisfy his basic needs for food, shelter, reasonable safety and medical care. By assuming responsibility for satisfying these needs, the Commonwealth did not assume a constitutional duty to provide him with additional services, such as treatment—that training and education necessary to maximize his developmental potential. Rather, having properly committed plaintiff in order to provide

him care, the Commonwealth is required only to maintain conditions of commitment which are rationally related to that purpose or other legitimate state interests, and not to take action which is plainly an exaggerated, totally unnecessary method of achieving one of those objectives. Among the legitimate interests involved are the provision of care or treatment, protection of plaintiff and other individuals in the facility, efficient and economical management of the facility, and security.

Viewed against this standard, the Third Circuit plainly erred in holding that, as a matter of substantive due process, the institutionalized mentally retarded have a right (1) to receive treatment which is both acceptable in light of present medical or other scientific knowledge and the least intrusive available under the circumstances, (2) to be free of bodily restraints, absent a showing of compelling necessity, and (3) to be protected from harm, however caused, absent a showing of substantial necessity. Under the proper standard, the record is devoid of any evidence that the defendants violated plaintiffs' rights, and the trial judge did not commit reversible error in his instructions to the jury or in his exclusion of testimony from plaintiff's expert witnesses.

In any case, the constitutional rights created by the Third Circuit certainly were not clearly established at any time prior to trial, and thus could not have been known to defendants at that time. Because the record would not support a finding of subjective bad faith—malice or an intent to injure plaintiff—the decision of the Court of Appeals should be vacated on the grounds of qualified immunity.

ARGUMENT

I. INTRODUCTION

Respondent in this case is a severely mentally retarded person who was committed to a state institution after a full hearing and a judicial determination that he was incapable of caring for himself in the community. Thus, procedural due process is not an issue in this case.[8]

Nor is there any question that Romeo was unable to satisfy his basic needs for food, shelter and medical care. In the petition for commitment, his mother, Paula Romeo, stated that she was "unable to handle him," "he is [sic] constant 24 hr. care" and she was "unable to care for him" (J.A. 18a). Romeo's need for care was confirmed by the physician and psychologist who examined him prior to his commitment. The physician noted that Romeo "[m]ust be fed and required constant care" (J.A. 22a); the psychologist stated that he "has no feeding, dressing, or washing skills," and "is dependent on others for his maintenance and completion of daily tasks" (J.A. 28a-29a). In short, he was not "capable of surviving safely in freedom" even "with the

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[8] There is no question that involuntary confinement to a state mental institution is a deprivation of liberty which must be accompanied by procedural due process protection. *Addington v. Texas*, 441 U.S. 418, 425 (1979). In Pennsylvania, the MH/MR Act provides numerous procedural protections, including notice, examination by a court-appointed physician and a hearing before commitment, Section 406, Pa. Stat. Ann. tit. 50 § 4406; and post-commitment provisions addressing when and how the committee may be released, Section 418, 420 and 426, Pa. Stat. Ann. tit. 50 §§ 4418, 4420, 4426. However, as Chief Justice Burger noted in *O'Connor v. Donaldson*, 422 U.S. 563, 587-88 (1975) (Burger, C.J. concurring), there is "no basis for equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without [procedural] due process of law with a constitutional right to treatment."

help of willing and responsible family members. . . ." *See O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

Thus, in this case, the Court must determine the substantive post-commitment constitutional rights of a mentally retarded person who has been properly committed because of an inability to care for himself in the community. Specifically, do such persons have a right, under the Due Process Clause of the Fourteenth Amendment, to receive services beyond that care—food, clothing, shelter, reasonable safety, and medical care—necessary to their survival? Or, has a state, which chooses to care for those of its citizens who are unable to care for themselves, also assumed a constitutional duty to guarantee their safety from all injuries and to provide treatment directed at maximizing their development. And, if it is true that assuming the task of care implies incurring the burden of treatment, must that treatment be provided in the least restrictive manner possible? Finally, if Pennsylvania has assumed such constitutional duties, has it fulfilled these obligations as to Romeo?

II. RIGHTS OF THE INVOLUNTARILY INSTITUTIONALIZED MENTALLY RETARDED

A. Overview

The substantive due process rights of the involuntarily [9] institutionalized mentally retarded is an issue of first impression. However, its determination requires atten-

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[9] In a sense, Romeo could be viewed as a voluntary resident of Pennhurst. Although challenging the conditions at Pennhurst, neither he nor his mother has sought his release (R. 1-60-62). Indeed, it was the same person, his mother, who sought his commitment and who now brings this action, on his behalf, challenging the conditions of that commitment. However, because his commitment was court-ordered, after hearing, defendants do not argue here that he was voluntarily committed.

tion to a number of considerations previously recognized by this Court.

First, this Court has repeatedly held that states are under no affirmative constitutional obligation to provide its residents with governmental services. *E.g.*, *Harris v. McCrae*, 448 U.S. 297 (1980) (publicly funded abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (medical treatment). Accordingly, no court has ever found that the constitution requires a state to provide mental health or mental retardation services to its residents.

As importantly, when states choose to provide services, they must be given a great deal of latitude in doing so. *Richardson v. Belcher*, 404 U.S. 78, 83-84 (1971); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970). Specifically, states need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge*, *supra* at 486-87. Thus, where a person is committed to a state mental institution for the purpose of providing care, it is sufficient that care be provided.[10] The state is not required to provide both care and treatment or forego commitment entirely, leaving the mentally disabled to their own devices.[11]

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[10] As used herein, the term "care" includes the provision of food, shelter, clothing and medical care, as well as reasonable safety. *See Goldy v. Beal*, C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976) (Consent Order). In contrast, "treatment" or "habilitation" means "'that education training and care required by retarded individuals to reach their maximum development.'" Although the terms "treatment" and "habilitation" may be used interchangeably, "habilitation" is the more accurate term describing services for the mentally retarded. *Romeo v. Youngberg*, 644 F.2d at 176 (Seitz, C.J., concurring) (Pet. App. 54a).

[11] Similarly, there is no constitutional duty to provide any services absent a deprivation of liberty. *O'Connor v. Donaldson*, *supra* at 575. Thus, any constitutional obligation owed to Romeo would be obviated by his release from Pennhurst.

This Court has also recognized that in evaluating cases involving other types of state institutions, deference must be afforded to the expert judgment of those officials responsible for operating the institution. *Cf. Bell v. Wolfish*, 441 U.S. 520, 541 (1979) (prison officials). This should be especially true where those judgments involve the "baffling" areas of care and treatment for the mentally ill and mentally retarded. *See Parham v. J.R.*, 442 U.S. 584, 606-09 (1979).

Finally, the involuntarily institutionalized mentally retarded in Pennsylvania have state law tort and statutory remedies available to test the conditions of their confinement. Applicable state law tort actions could include malpractice, other negligence, false arrest and assault.[12] In addition, the Supreme Court of Pennsylvania has recognized a cause of action based on the Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § 4401 *et seq. Freach v. Shovlin*, 471 Pa. 588, 370 A.2d 1163 (1977).

The importance of these state law remedies has been highlighted by this Court's recent decision in *Parratt v. Taylor*, 101 S. Ct. 1908 (1981), in which the Court concluded that a negligent deprivation of property[13] did not occur without due process of law because the plaintiff had an adequate tort remedy under Nebraska law. In so holding, the Court reaffirmed the principal that the Fourteenth Amendment is not intended to be a "font of

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[12] No state law claim has been pled here. *See* Second Amended Complaint (Pet. App. 86a-92a).

[13] While *Parratt* involved a deprivation of property and not liberty, the Court relied on two liberty cases in reaching its decision: *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Paul v. Davis*, 424 U.S. 693 (1976). 101 S.Ct. at 1916-17. Moreover, there is no logical basis for distinguishing the negligent deprivation of property from the negligent deprivation of liberty alleged in this case.

tort law to be superimposed upon whatever systems may already be administered by the states." *Id.* at 1917.[14]

That reasoning is equally compelling in resolving the substantive due process claims raised in this case. To accept Romeo's claim that the conduct complained of in this case constituted a violation of substantive due process "would almost necessarily result in turning every alleged injury . . . [occurring in an institution for the mentally retarded] into a violation of the Fourteenth Amendment cognizable under § 1983." *See id.* As in *Parratt*, "[i]t is hard to perceive any logical stopping place to such a line of reasoning." *See id.* Accordingly, while the existence of state law remedies may not foreclose plaintiff's substantive due process claims, this Court should be reluctant to recognize constitutional claims identical to those cognizable under state law.

It is with these considerations in mind that Romeo's substantive due process claims should be viewed.

B. Substantive Due Process Rights of the Involuntarily Institutionalized Mentally Retarded

The Due Process Clause of the Fourteenth Amendment prohibits state deprivations of life, liberty or property without due process of law. Substantive due process, in

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[14] Specifically, the Court recognized that:

> [t]o accept respondent's argument that the conduct of state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. . . . Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Paul v. Davis*, 424 U.S. 693, 701. We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Id.

particular, bars such deprivations without sufficient justification. Generally, one of two standards has been applied to determine whether any given state action is justified. Where fundamental rights are involved, the Court has inquired into whether the infringement of those rights was justified by a compelling state interest.[15] Otherwise, the Court has employed the traditional due process test—whether the activity at issue is rationally related to any legitimate state interest.[16]

Although this Court has never before determined the substantive due process rights of institutionalized mentally retarded persons, in *Bell v. Wolfish*, *supra*, it discussed the rights of another group of institutionalized individuals—pre-trial detainees. In *Bell*, the Court held that so long as the conditions of confinement are reasonably related to a legitimate, nonpunitive government objective, 441 U.S. at 539, and there is not substantial evidence that the government officials in question have

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[15] In the last twenty years, fundamental right analysis has been used almost exclusively where "the individual's freedom of choice with respect to certain basic matters of procreation, marriage and family life" was involved. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976). *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Stanley v. Illinois*, 405 U.S. 645 (1972) (father's custody rights); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptives). This caution has been based on a recognition that the Due Process Clause should not be used as a vehicle to substitute judicial judgments for those of legislative and executive branches. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941).

[16] *See, e.g., Bell v. Wolfish, supra; Harrah Independent School District v. Martin*, 440 U.S. 194 (1979).

In the last ten years, in both due process and equal protection cases, the trend appears to be toward a single rational relationship standard of review. *See Bell, supra* (rights of pre-trial detainees); *Weinberger v. Salfi*, 422 U.S. 749 (1975) (limiting "irrebuttable presumption" doctrine in due process cases).

made an exaggerated response to these objectives, *id.* at 548, courts should not interfere with their expert judgment in operating the institution. *Id.* Applying this standard, the Court recognized that the confinement of pre-trial detainees was justified by the state's legitimate interest in ensuring the detainees' presence at trial. It went on to find other legitimate interests stemming from the need to manage the facility and held that they too could justify conditions of confinement. *Id.* at 541.

Here, as in *Bell*, the interests "involved simply [do] not rise to the level of those fundamental liberty interests delineated in cases such as *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923)." 441 U.S. at 534-35. Thus, the rational relationship test utilized in *Bell* is equally applicable here and the same result is required.

In applying that test, the first question is whether a legitimate state interest exists. In this regard, commitment of the mentally disabled involves a number of legitimate state interests. The generally articulated bases for such commitments include danger to self, danger to others and the need for care, treatment or training. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972). This Court has specifically recognized the states' interest (1) in providing care to its citizens who are unable because of emotional disorders to care for themselves, and (2) in protecting the community from the dangerous tendencies of those who suffer from mental disabilities. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

This recognition is consistent with the fact that, historically, the mentally disabled were confined simply to provide them with custodial care. *See O'Connor v. Don-*

aldson, 422 U.S. at 582 (Burger, C.J., concurring).[17] The theory that the states may only confine such persons if they provide treatment is a comparatively recent phenomenon. *See id.* Despite recent developments in the treatment of the mentally ill, it is unquestionable that some forms of mental illness continue to be untreatable in terms of finding a real "cure". *See* Schwitzgebel, *The Right to Effective Mental Treatment*, 62 Cal.L. Rev. 936, 941-48 (1974). Where the mentally retarded are concerned, talk of a "cure" is misleading. The goal, at best, is to improve the person's condition.[18] Thus, discussion of treatment as the sole constitutional basis for confining the mentally retarded is simply unrealistic. *See Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84, 125 (3d Cir. 1979) (Seitz, C.J., dissenting), *rev'd*, 101 S.Ct. 1531 (1981).

Accordingly, Pennsylvania law recognizes that care is a basis for commitment of the mentally retarded. Section 406(a) of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4406 (a),[19] provides:

> Whenever a person is believed to be mentally disabled, and *in need of care or treatment* by reasons

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[17] *See also Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977), *rev'd and rem'd on other grounds*, 430 U.S. 322 (1977) (*per curiam*); Note, *Civil Commitment of the Mentally Ill*, 87 Harv. L.Rev. 1190, 1327 (1974) (hereinafter *"Civil Commitment"*).

[18] Indeed, there is even some debate as to whether the profoundly mentally retarded can benefit in any significant way from habilitation efforts. *See* Ellis, *The Partlow Case: A Reply to Dr. Roos*, 5 Law and Psychiat. Rev. 15, 19, 23 (1979).

[19] In *Goldy v. Beal*, 429 F.Supp. 640 (M.D.Pa. 1976), a three-judge court declared Section 406 to be unconstitutional on grounds of vagueness. Subsequently, a consent order was entered allowing commitment of a mentally retarded individual who is unable to provide "for his most basic need for nourishment, personal and medical care, shelter, self-protection and safety." *Goldy v. Beal*, C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976) (Consent Order).

> of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

(Emphasis added.)[20] Thus, while need for treatment is one basis for commitment under state law, need of care is another. Other provisions of the MH/MR Act support this conclusion. For example, Section 418 of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4418, provides: "If no period is specified in a commitment, the person may be detained until care *or* treatment is no longer necessary. . . ." (Emphasis added.)

Because provision of care is a legitimate state interest, so long as care is provided, the rational relationship test has been met. *See Bell v. Wolfish, supra; Jackson v. Indiana, supra.* Having provided care to the institutionalized mentally retarded, the state is not required to provide treatment as well. Rather, it is permissible that states deal with one problem at a time. *Dandridge v. Williams, supra.*[21]

To the extent specific conditions of confinement are being challenged, the rational basis test is again applicable. If the initial and most serious deprivation of

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[20] Prior to 1976, this provision also applied to commitment of the mentally ill. Since 1976, the mentally ill may be committed only if they are "severely mentally disabled and in need of treatment." Section 304(a) of the Mental Health Procedures Act, Pa. Stat. Ann. tit. 50 § 7304(a).

[21] Despite this limited constitutional obligation, Pennsylvania has been extremely responsive to the needs of its mentally retarded citizens. As the Third Circuit itself recently noted, Pennsylvania has allocated "an extraordinary large portion of its budget" to the mentally disabled. *Doe v. Colautti,* 592 F.2d 704, 711 (3d Cir. 1979).

liberty—commitment—can be justified by legitimate, rational state interests, there is no basis to require that post-commitment deprivations meet a higher standard. While commitment does not effect a forfeiture of all constitutional rights, the fact of commitment does permit those rights to be subject to restrictions and limitations so long as those limitations serve legitimate goals and policies of the institution. *See Bell v. Wolfish*, 441 U.S. at 546.

There are a number of legitimate state interests involved in the operation of institutions for the mentally retarded. They include provision of care or treatment, protection of the person, protection of other residents and persons in the facility, and efficient and economical operation of the institution. So long as the conditions of confinement are reasonably related to any of these objectives, and officials have not taken some extreme action which is plainly an exaggerated, unnecessary method of trying to achieve one of these objectives, no substantive due process violation has occurred. *See Bell v. Wolfish, supra.*

In light of these principles, the fundamental errors of the majority opinion of the Third Circuit are clear.

III. THE THIRD CIRCUIT ERRED IN EVALUATING THE RIGHTS OF THE MENTALLY RETARDED

A. Introduction

By its opinion, the Third Circuit has clearly established a constitutional cause of action for nearly any personal injury which may occur in a state mental institution. In so doing, the Third Circuit failed to explain why torts, such as malpractice, become constitutional violations merely because the victim is committed to an institution for the mentally retarded. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Indeed, considering the standards it proposed for these new causes of action, the Court of Appeals has apparently created a constitu-

tional strict liability claim for the institutionalized mentally retarded.

In Pennsylvania, malpractice has been defined as the unjustified departure from established standards of medical practice. *Incollingo v. Ewing*, 444 Pa. 263, 282, 282 A.2d 206, 217 (1971). The Third Circuit apparently used this definition as a starting point, requiring that treatment be regarded as "acceptable for him in light of present medical or other scientific knowledge." 644 F.2d at 169 (Pet. App. 38a). However, it then broke entirely new ground by requiring a higher standard be met where (1) no treatment was given ("compelling explanation"); (2) a significant deprivation of liberty has occurred ("least intrusive"); or (3) restraints have been used ("compelling necessity"). Significantly, unlike state law torts, the burden is on a defendant to prove that these standards have been met. Thus, while this Court has cautioned against turning malpractice into a "constitutional violation," *see Estelle v. Gamble*, *supra* at 106, the Third Circuit has established constitutional torts which would not even be actionable under state law.

The Third Circuit's holding graphically illustrates this Court's recognition that courts are poorly equipped to make medical judgments. *See Parham v. J.R.*, *supra*.[22] For example, in deciding that "mental retardation professionals have relegated the use of physical restraints to the closets of an earlier age," 644 F.2d at 160 (Pet. App. 18a), and that the use of restraints was presumptively punitive, *id.* at 159 (Pet. App. 15a), the Court of Appeals made the purest kind of medical decision. Moreover, that judgment was absolutely incorrect.[23] Indeed,

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[22] *See generally* Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. Chi. L. Rev. 755, 782 (1969); *Civil Commitment*, *supra* note 17, at 1333-34.

[23] Recent commentaries support use of restraints in treatment programs. *See, e.g.*, Bursten, *Using Mechanical Restraints on Acutely Disturbed Psychiatric Patients*, 25 Hosp. and Comm. Psychiat. 757 (1975); Gutheil, *Restraint Versus Treatment: Se-*

even one of plaintiff's experts would have conceded the propriety of using restraints for treatment in certain cases (Pet. App. 101a).

In addition, the various and multi-leveled rights created by the Third Circuit are conflicting, confusing, impractical and unnecessarily complex. For those who must follow them, they are nearly impossible to understand, let alone implement. For example, it is far from clear what the court meant by "compelling necessity," "substantial necessity," and "least intrusive treatment available." *See Romeo v. Youngberg, supra* at 175 (Seitz, C.J., concurring) (Pet. App. 51a). Nor is it clear which test applies when treatment involves the use of restraints. *See id.* Finally, an aggressive patient's right to be free of restraints and receive the least intrusive treatment cannot necessarily be reconciled with another patient's right to be protected from harm. Thus, when the "rights" of two patients are considered, conflict becomes almost unavoidable and a Hobson's choice is presented.

The entire substantive due process analysis of the Third Circuit is based on the incorrect premise that the conditions of commitment challenged in this case involve "fundamental liberty interests." In accepting that premise, the lower court recognized that this Court rejected the "compelling necessity" standard in *Bell v. Wolfish, supra.* 644 F.2d at 158 n. 15 (Pet. App. 11a). However, it attempted to distinguish *Bell* on the basis, *inter alia,* that the detainees in that case received greater procedural protections under criminal process.[24] Under

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clusion as Discussed in the Boston State Hospital Case, 137 Am. J. Psychiat. 718 (1980); Rosen *et al., The Role of Physical Restraint in the Treatment of Psychiatric Illness,* 39 J. Clin. Psychiat. 228 (1978); Soloff, *Physical Restraint and the Nonpsychotic Patient, Clinical and Legal Perspectives,* 40 J. Clin. Psychiat. 302 (1979). *See also* 42 C.F.R. § 442.438 (Medicaid regulation allowing use of restraints where necessary to protect from harm).

[24] Besides being irrelevant, this distinction is false. The involuntarily committed have had a full hearing and final judicial

this analysis, the detainees in *Bell* had fewer substantive rights merely because greater procedural protections were provided to them by the criminal process. *See id.* Thus, the Third Circuit improperly "elevate[d] a concern for essentially procedural safeguards into new substantive constitutional rights." [25] *See O'Connor v. Donaldson*, 422 U.S. at 587 (Burger, C.J., concurring).

Finally, the practical ramifications of the Third Circuit's decision are most disturbing. The threat of personal monetary liability will inevitably discourage talented professionals from seeking or maintaining employment in state institutions. This is especially true when they are being held liable in damages for matters beyond their control. For example, there is no evidence that defendants had any control over the amount of money available to provide services at Pennhurst. Yet, the Court of Appeals found lack of funding to be no defense to at least one of Romeo's claims. 644 F.2d at 161 (Pet. App. 18a). *See also Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), *pet. for cert. pending*, No. 80-1699. Moreover, to the extent that daily treatment decisions are at issue, the defendant supervisory officials in this case had no direct involvement in those decisions and are, therefore, being held vicariously responsible for the acts of others. *But see Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

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determination, based on clear and convincing evidence, as to the propriety of their confinement. *See Addington v. Texas, supra.* Pre-trial detainees, on the other hand, have had only a preliminary determination of probable cause to justify their detention. Obviously, the latter provides substantially less procedural protection.

[25] Its confusion was clear in its application of the procedural due process test set forth by this Court in *Mathews v. Eldridge*, 424 U.S 319 (1976), to evaluate the substantive due process rights of respondent, 644 F.2d at 160 n.26 (Pet. App. 16a-17a).

The Third Circuit's decision can only make it more difficult to hire and keep qualified personnel, an unfortunate and ironic result. In an apparent effort to aid the mentally disabled, the lower court has created a situation which could well result in a deterioration of the quality[26] of services due to the lack of top-notch personnel. Such a result is clearly contrary to the interest of the mentally retarded and the public. *See Romeo v. Youngberg, supra* at 185 (Aldisert, J., concurring) (Pet. App. 75a-76a).

B. Right to Treatment Claim

This Court has never held that either the involuntarily confined mentally ill or mentally retarded have a constitutional right to treatment. *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531, 1539 (1981). *See O'Connor v. Donaldson*, 422 U.S. at 573. Indeed, in its recent *Pennhurst* decision, the Court cited, with apparent approval, *Sanchez v. New Mexico*, 396 U.S. 276 (1970), in which the Court dismissed, for want of a substantial federal question, an appeal from a lower court decision holding that the involuntarily committed have no right to treatment.[27]

Among the other circuit courts of appeals, apparently only the Fifth and Eighth Circuits have found that due process includes such a right.[28] *See, e.g., Goodman v.*

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[26] Quantitatively, those services may also suffer. In light of the present trend of cutting government services in this country, it is not inconceivable that, if states are required to provide services at the level contemplated by the Third Circuit, state legislatures will conclude that it has simply become too expensive to provide the current level of services.

[27] *State v. Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969).

[28] The District of Columbia Circuit has recognized such a right in dicta, where statutory language also provided such a right. *See Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Lake v. Cameron*, 331 F.2d 771 (D.C. Cir. 1964).

Parwatikar, 570 F.2d 801 (8th Cir. 1978);[29] *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (subsequent history deleted); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vac'd and rem'd*, 422 U.S. 563 (1975). The Fifth Circuit, however, has retreated from this position, noting that it has "considerable doubts about the legal theory of a right to treatment." *Morales v. Turman*, 562 F.2d 993, 996 (5th Cir. 1977).

In finding a right to treatment, the Third Circuit adopted a form of "quid pro quo" theory.[30] Under this theory, the state must give something in exchange for the curtailment of freedom involved in civil commitments. That something, according to the Third Circuit, is treatment.

The fundamental flaw in this analysis is its assumption that treatment provides the sole underlying basis for commitment. 644 F.2d at 138 n. 18 (Pet. App. 13a). It ignores the fact that the state may validly confine the mentally ill or mentally retarded for reasons *other than treatment*. *See Addington v. Texas*, *supra*. *See also* pp. 16-18, *supra*. There is no constitutional duty to provide care *and* treatment, or nothing at all, to those, like Romeo, who are "helpless to avoid the hazards of freedom." *See O'Connor v. Donaldson*, *supra* at 574 n. 9. Thus, even under "quid pro quo" analysis, one who is validly committed for care, need only be provided care. Spece, *supra* note 30, at 14.[31]

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[29] In *Goodman*, the Eighth Circuit cited for this proposition *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977), in which the court approved, without discussion, the District Court's decision.

[30] There are apparently at least three different "quid pro quo" theories. *See* Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1, 4 (1978) (criticizing all "quid pro quo" theories).

[31] Moreover, for due process purposes, it is enough that there be "any state of facts either known or which could reasonably

Finally, where a right to treatment has been found, it has generally been in a situation where virtually no treatment at all is being given. *See Wyatt v. Aderholt*, *supra*; *Donaldson v. O'Connor*, *supra*. Here, there is no dispute that Romeo received treatment and programming while at Pennhurst (R. 5-44-56, 227, 242-50). Thus, the real issue here is not whether Romeo should have received treatment, but rather what kind and in what amount. There is no basis in the Due Process Clause for judicial decision-making of that sort. To the contrary, as this Court has recognized, it is precisely those types of decisions that courts are ill-equipped to make and should avoid. *See Parham v. J.R.*, *supra*. Accordingly, the Third Circuit clearly erred in finding a right to treatment in this case.

C. Least Restrictive Alternative Theory

The least restrictive alternative concept adopted by the Third Circuit in evaluating treatment involving "a significant deprivation of liberty" is totally unworkable and finds no basis in the decisions of this Court.[32] Regardless of whether any treatment right is found in this case, the "least intrusive" standard should be soundly rejected.

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be assumed" to support the challenged action. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). In addition, "[f]or those purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay" the decision in question. *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Thus, the lower court's incorrect holding that state law authorizes commitment only for treatment, *see* pp. 16-18, *supra*, is irrelevant to the due process question. So long as the need for care could justify commitment, the existence of a state law right to treatment is irrelevant for due process purposes.

[32] The discussion here also applies to the least restrictive standard which the Third Circuit would use in analyzing claims involving restraints.

This Court has never held that those committed to a state mental institution have a right to treatment in the least restrictive environment. *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. at 1539, *citing Sanchez v. New Mexico*, *supra*. Nor has this Court ever recognized a right to receive the "least intrusive treatment." Indeed, the development of those legal concepts precludes its extension to the area of health care.

The "least restrictive alternative" theory arose in the free speech area,[33] and has been used only where free speech or some other fundamental interest was involved. *See, e.g., Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977). Even then, the Court has only utilized the standard where a legislative determination—a statute or ordinance—was at issue. Certainly, the theory has never been applied by this Court to a continuing course of conduct.

It is, therefore, not surprising that this Court has recently criticized the concept, commenting that "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting...." *Pennhurst State School and Hospital*, *supra* at 1543. It would be anomalous to conclude that such vague terms are constitutionally based.[34]

This Court's criticism is justified by the holding in this case. The Third Circuit's "least intrusive treatment" analysis requires a balancing of the possibility of improvement against the risk of serious side effects in choosing a treatment approach. 644 F.2d at 166 (Pet. App.

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[33] *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964). *See also* Richardson, *Freedom of Expression and the Function of the Courts*, 65 Harv. L. Rev. 1, 40 (1951) (least restrictive analysis criticized); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 473-74 (1968) (standard unworkable).

[34] The same reasoning applies to the "compelling necessity" standard. As the majority below recognized, these two standards are virtually indistinguishable. 644 F.2d at 161 n.27 (Pet. App. 18a). *See Shapiro v. Thompson*, 394 U.S. 618, 634-37 (1969).

31a-33a). The court, however, offered no meaningful guidance as to how this test should be applied by professionals in cases involving both risk and possibility of improvement, noting only that "[w]hen the state is the decision-maker . . . such actions should err on the side of safety." *Id.* at 166 n.45 (Pet. App. 32a).

Nearly all treatment involves some risk. Moreover, "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation. . . ." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). *See also Bell v. Wolfish*, 441 U.S. at 502 n. 40. Thus, the Third Circuit's standard is best satisfied by avoiding risk at all costs, opting for the safest, rather than the most beneficial, treatment. This result is unacceptable and cannot be constitutionally required.[35]

D. Restraint Claim

In creating a constitutional right to be free of restraints or shackles,[36] the Third Circuit broke totally new ground. The fundamental fallacy of this unprecedented decision is the lower court's total failure to recognize that restraints can play a role in the treatment, care and protection of the institutionalized mentally retarded. Indeed, even one of the plaintiff's experts was prepared to testify that the use of restraints is an acceptable

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[35] *See generally* Hoffman, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 San Diego L. Rev. 1100, 1107 (1977).

[36] The very use of the term "shackles" by the majority below is an obvious effort to conjure up visions of dungeons and medieval practices. *See* 644 F.2d at 159 n.22 (Pet. App. 15a). As the record establishes, three different types of restraints were actually used: a leather muff around the hands, "soft restraints," which secure a patient's arms or legs to a chair or bed, and metal restraints, which consist of a metal wrist or leg band attached to a leather belt which is then tied to a chair or bed (R. 4-170-71; 7-50-56). When restraints were used on Romeo, "soft restraints" were generally used (R. 7-54).

form of treatment (Pet. App. 101a). Moreover, it is not uncommon for the profoundly mentally retarded to be violent and abusive, either to themselves or others. *See Civil Commitment, supra* note 17.[37] Restraints are used to protect such persons from themselves and others, and indeed, their use for that purpose is recognized as proper in national standards promulgated by the federal government.[38] Thus, there is no factual basis for the lower court's assumption that the use of restraints "is not normally within the range of conditions of confinement contemplated in habilitative institutionalization," 644 F.2d at 164 (Pet. App. 16a), and, therefore no legal basis for that court's application of a compelling necessity standard to the use of restraints.

Rather, the state has a legitimate interest in the welfare of residents in a state institution, in protecting them from other violent residents and in protecting them from themselves. It is entitled to take steps that are reasonably related to that interest.[39] Use of restraints serves these interests, and therefore satisfies due process.

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[37] *See generally* Eyman, *Maladaptive Behavior and Community Placement of Mentally Retarded Persons*, 82 Am. J. Ment. Deficiency 137 (1977); Moen, *Follow-up of Mentally Retarded Adults Successfully and Unsuccessfully Placed in Community Group Homes*, 26 Hosp. and Comm. Psychiat. 754 (1975).

[38] Regulations under Title XIX of the Social Security Act specifically recognize the use of physical restraints for the mentally retarded where necessary "to protect the resident from injuring himself or others." 42 C.F.R. § 442.438.

[39] The Third Circuit's difficulty in recognizing any legitimate use of restraints may spring from its misreading of state law, an issue which neither side had raised. Section 422 of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4422, provides for the use of mechanical restraints within an institution where "the director of a facility or his designee determines that such are required by the medical needs of such person . . . , in accordance with regulations of the [D]epartment [of Public Welfare]. Department regulations generally provided for the use of restraints on the order of a physician "for the purpose of protecting the patient or others from aggressive acts of the patient." 7 Pa. Bull. 3199 (Oct. 29, 1977). While the majority below felt that the director "or his designee" had not

E. Protection From Harm Claim

The trial judge instructed the jury that "if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo," such failure deprived him of constitutional rights (J.A. 73a). This was precisely the language requested by Romeo in a proposed jury instruction (Pet. App. 93a).[40] In contrast, the Third Circuit majority concluded, *sua sponte*, that the jury should have been instructed that Romeo had a constitutional right to personal security and protection from attack by other residents, unless defendants could show substantial reasons or necessity as to why the attacks occurred despite their attention. 644 F.2d at 164, 172-73 (Pet. App. 25a, 46a). The Third Circuit standard, which places a heavy burden of proof on defendants, should be rejected.[41]

While this Court has recognized, in the context of procedural due process, that the liberty preserved by the Due Process Clause includes freedom from bodily restraint and punishment, *see Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), it has never held that the state has a substantive obligation to guarantee the safety of its citizens. The involuntarily committed may well argue that state officials have some duty to protect them from

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approved the use of restraints, 644 F.2d at 159 n.21 (Pet. App. 14a), restraints were only used on Romeo at the direction of a staff physician (R. 5-221; 6-59, 67, 141; 7-76), thus satisfying the requirements of state law.

[40] In all, Romeo requested three separate instructions on this issue (Pet. App. 93a, 94a, 96a). All three were affirmed by the District Court (J.A. 44a, 48a).

[41] The Third Circuit's reliance on Section 401 of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4401, is misplaced. Section 401(c) of the Act simply provides for commitment to a facility which is "willing and able to receive him." It is silent on any right to protection from harm, and no state court has ever suggested such a strained interpretation. Indeed, neither side even raised this section in the courts below.

repeated attacks of which the officials knew or should have known, but there is no basis to argue that their rights go beyond the District Court's instruction here. To require defendants to make a showing of substantial necessity would be an unprecedented[42] shifting of the burden of proof in civil rights actions amounting to a strict liability standard.

The inappropriate nature of such a standard of review is illustrated by the facts. While the Third Circuit refused to recognize that Romeo or any of the residents at Pennhurst are a danger to others, 644 F.2d at 158 n.18 (Pet. App. 13a), even the 1974 commitment papers of Romeo reflect dangerousness to himself and others: "he becomes violent—kicks, punches, breaks glass. . ." (J.A. 18a), according to his mother; and according to the examining physician, "[Romeo] is easily excitable," and was observed "banging his head against bedrail" (J.A. 22a). This dangerous nature continued to be demonstrated while at Pennhurst.[43] Considering this history and the fact that he was in a facility with other residents with similar tendancies, the number of injuries which he suffered while at Pennhurst, many of which were self-inflicted, is not unusually high.

Conceivably, violence between residents could be reduced by more use of restraints or isolation, but Romeo certainly would not have been happy with that solution. More importantly, interaction with other residents is in his best interests. In balancing these various interests,

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[42] The Third Circuit again appears to stand alone among the circuit courts of appeals in its recognition of a right to protection from harm. Several district courts have found such a right. *See, e.g., Halderman v. Pennhurst State School and Hospital*, 446 F.Supp. 1295 (E.D. Pa. 1977) (subsequent history deleted); *New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 1973).

[43] *See, e.g.*, R. 1-37-39; 2-48-52; 5-37-40.

it is obvious that the solution lies with mental retardation professionals, and not with the courts.

IV. UNDER THE CORRECT STANDARD, IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL JUDGE TO EXCLUDE THE EXPERT TESTIMONY OFFERED BY PLAINTIFF

Admission of expert testimony rests with the sound discretion of the trial court and will not be overturned absent manifest error. *Spokane and Inland Empire Railroad Co. v. United States*, 241 U.S. 344, 351 (1915); *Spring Co. v. Edgar*, 99 U.S. 645, 656 (1878). In *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962), the Court recognized the general rule:

> [E]xpert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge if all the primary facts can be accurately and intelligently described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation. . . .

See also Rhodes v. Chapman, —— U.S. ——, No. 80-332 (Jun. 15, 1981) (slip op. at 14-15 n.13) (expert testimony as to prison conditions not relevant on constitutional minima).

In this case, counsel for plaintiff sought to introduce the testimony of two expert witnesses, Dr. Richard Foxx and Dr. Warren Grover. By offers of proof, it was represented to the court that those witnesses would testify that the treatment programs provided Romeo at Pennhurst were inappropriate and that the use of appropriate treatment programs would have improved his condition.

Considering these offers, the District Court did not abuse its discretion in excluding the evidence. There is

simply no dispute that Romeo has received care and treatment throughout his commitment to Pennhurst. *See* note 3, *supra*. As is noted above, Romeo has no constitutional right to treatment, let alone to a specific quality or kind of treatment. Thus, testimony that more and/or better treatment could have been provided was irrelevant and properly excluded.

V. THE DISTRICT COURT JUDGMENT SHOULD BE REINSTATED

When the proper analysis of the constitutional claims is applied here, it is clear that the District Court judgment should be reinstated. If the trial judge erred at all in his instructions to the jury, when the charge is viewed as a whole, it was harmless error. Moreover, the record made before the District Court provides no basis for finding any constitutional violations by any of the defendants. Thus, because defendants' directed verdict motion should have been granted, the decision of the Third Circuit should be vacated with directions to affirm the judgment of the District Court.

As is noted above, the state had an obligation to provide conditions of confinement that were reasonably related to legitimate state interests. While the District Court gave jury instructions which were couched in Eighth Amendment terms, the charge, taken as a whole, adequately described the nature of plaintiff's constitutional rights. If anything, the trial judge erred in plaintiff's favor.

For example, the trial judge's instruction on protecting Romeo from harm required that the jury find a constitutional violation if it found that defendants "were aware of and failed to take reasonable steps to prevent repeated attacks upon Nicholas Romeo . . ." (J.A. 73a). Because this is the exact language requested by Romeo

(Pet. App. 93a-96a), it certainly could not provide the basis for reversible error on appeal. In any event, this instruction is either identical to or stricter than an appropriate due process instruction requiring that defendants' actions be rationally related to legitimate state interests.

As to the instruction on the use of restraints, the jury was instructed to find a constitutional violation if it found that Romeo was shackled as punishment, but to find for defendants if it found those acts were taken in a good faith effort to treat his condition (J.A. 73a). In requiring a good faith effort to "treat" Romeo in order to justify shackling, the lower court required, if anything, more than the necessary rational relationship to the care and protection of Romeo and others.

Finally, the instruction on whether defendants were deliberately indifferent to the medical and psychological needs of Romeo is roughly the equivalent of the proper instruction requiring that the conditions of confinement be rationally related to the provision of care. Accordingly, while the lower court may have erred in its instructions to the jury, the error, if any, was harmless.

In any case, under the proper constitutional standards, a directed verdict should have been granted to defendants. As one commentator stated:

> Errors in instructions routinely are ignored if a motion for a directed verdict should have been granted, or if the erroneous instruction went to an issue that is immaterial in the light of the jury's verdict, or if it otherwise is apparent that the error could not have changed the result.

11 Wright and Miller, *Federal Practice and Procedure* § 2886 (1973) (footnote omitted). The undisputed evidence at trial established that Romeo was not denied the basic necessities—food, shelter, clothing and medical care.

Indeed, he did not even allege such a denial. Thus, the rational relationship test has been met. Moreover, even if he were entitled to treatment, the record establishes that he received a variety of treatment and training programs designed to curb his aggressive behavior and improve his self-help skills.[44] The record similarly fails to evidence any improper use of restraints or failure by the defendants to take reasonable steps to protect Romeo from self-injuries or attacks by others.

In light of the undisputed evidence at trial, defendants' directed verdict motion should have been granted. Thus, regardless of the charge to the jury, a verdict for defendants was mandated by the evidence.

VI. THE THIRD CIRCUIT ERRED IN NOT AFFIRMING THE DISTRICT COURT JUDGMENT ON QUALIFIED IMMUNITY GROUNDS

In remanding this case for a new trial, the Third Circuit recognized both the "evolving nature of the rights in issue," [45] and that defendants were not "charged with predicting the future course of constitutional law." 644 F.2d at 171 (Pet. App. 43a). Nevertheless, it remanded the case for a jury determination on the "possibility of immunity." *Id.* at 171-72 (Pet. App. 43a). Where, as here, there is no evidence of "subjective" bad faith and the only remaining issue—"objective" good faith—is purely a question of law, judgment should be entered for defendants.

It is well settled that state officials are immune from civil rights liability when they act in good faith. *Procunier v. Navarette*, 434 U.S. 555 (1978); *O'Connor v.*

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[44] *See, e.g.*, R. 5-44-56, 242-50.

[45] Indeed, the majority opinion begins: "The present controversy inhabits the twilight area of developing law concerning the constitutional rights of the involuntarily committed mentally retarded." 644 F.2d at 154 (Pet. App. 3a).

Donaldson, supra; Wood v. Strickland, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The applicable standard was stated in *Scheuer* as follows:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48. The good faith immunity standard has both a "subjective" and "objective" element. *Wood, supra* at 312. If the official either (1) "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . .," or (2) "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the [plaintiff's] constitutional rights . . .," the immunity defense is not available. *Id.* at 322.

As to the first part of this test, the "subjective" aspect, the record is totally devoid of any evidence of intent by the defendants to injure Romeo or violate his rights, let alone any malicious intention.[46] To the contrary, the record is replete with evidence as to how each of the defendants tried to help him.[47] Indeed, on this basis alone, defendants' motion for a directed verdict should have been granted.

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[46] None of the opinions filed by the court below even suggested that such evidence was present.

[47] *See, e.g.*, R. 5-229, 236-37, 242-50; 6-28-30, 46-47, 133, 139-40; D.Ex. 10, R. 6-195, 7-86.

As to the "objective" part of the test, this Court has noted that state officials "cannot be expected to predict the future course of constitutional law." *Procunier, supra* at 562. It is only where the constitutional right "was clearly established at the time of [the] challenged conduct" that the test has not been met. *Id.* By its very nature, in a jury trial, this determination must be made by the trial judge.[48] Despite the expertise of jurors in resolving factual disputes, short of giving them a crash course in constitutional law, they cannot reasonably be expected to decide whether a particular constitutional right was clearly established at a particular point in time. Indeed, this task is difficult for even trial and appellate court judges. Where a court of appeals creates new constitutional rights on appeal from a jury verdict for defendants, any remand order should recognize that "objective" good faith is not at issue on remand.

Here, there can be no other conclusion than that the constitutional rights found by the Third Circuit majority were not clearly established between 1974 and 1978. If the District Court judge in 1978 and four of the nine judges on the Third Circuit in 1980 were not convinced that such rights existed, Duane Youngberg, Dick Matthew and Marge Conley cannot be charged with such knowledge prior to 1978.[49]

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[48] For example, in *Procunier, supra*, this Court held that the District Court properly entered summary judgment for defendants on the immunity issue. *See also Dilmore v. Stubbs*, 636 F.2d 966 (5th Cir. 1981) (trial judge's grant of defendants' directed verdict motion on qualified immunity grounds affirmed).

[49] In *Dilmore v. Stubbs, supra*, a remarkably similar situation was presented to the Fifth Circuit this year. A mentally ill person had brought an action challenging that his confinement at the Mississippi State Hospital violated constitutional rights to be protected from harm and to be held in the least restrictive environment. The District Court directed a verdict for defendants on the qualified immunity issue and the Fifth Circuit affirmed, reasoning that the rights at issue were "anything but settled and indisputable." 636 F.2d at 971.

Thus, even if the Third Circuit was correct in its ruling on Romeo's constitutional rights, the judgment of the District Court should be affirmed on immunity grounds.

CONCLUSION

The decision of the Third Circuit Court of Appeals should be vacated with directions to affirm the judgment of the District Court.

Respectfully submitted,

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FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1429

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

DUANE YOUNGBERG, *et al.*,
Petitioners,

v.

NICHOLAS ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, PAULA ROMEO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether respondent, who has been involuntarily confined to a Pennsylvania institution for retarded persons, has a constitutional right to any or all of the following:
   (a) decent care;
   (b) reasonable protection from harm;
   (c) freedom from prolonged and unnecessary custodial shackling; and
   (d) minimally adequate habilitation.
2. Whether the court of appeals correctly ruled that a new trial is required because respondent's excluded expert testimony was relevant to the question whether any of those rights was violated.
3. Whether on this record petitioners are immune from suit as a matter of law.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions listed by petitioners, Pa. Stat. Ann. tit. 50 §4406(b) provides:

> "If upon examination it is determined that such person is in need of care at a facility * * * [the court] may order the commitment of such person for care and treatment."

STATEMENT OF THE CASE

1. For the first 26 years of his life respondent, an individual who is retarded, lived at home with his parents. During those years he attended a school for retarded persons, accompanied his family on various outings in the community, and lived a relatively ordinary life. (Tr. 1-31-38.) When his father died suddenly in May 1974, however, he became distressed and was temporarily hospitalized in Philadelphia.[1] In July 1974 a Pennsylvania court committed respondent to the Pennhurst State School and Hospital pursuant to the involuntary commitment provisions of Pa. Stat. Ann. tit. 50, §4406(b).

While at Pennhurst respondent suffered a series of injuries, some of them quite serious. (Pet. App. 5a.)[2] His mother, Mrs. Romeo, repeatedly attempted to improve his

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[1]Although respondent was difficult to handle when he was first admitted to the hospital, hospital records show that during his 20-day stay there he "responded well to attention * * * was able to make his needs known and to learn a few small tasks of self care" and became "more calm and manageable." (Ex. D-12.)

[2]Respondent suffered no serious injuries during the 26 years he lived at home. (Tr. 2-121-28.)

situation at Pennhurst or to have him transferred.[3] When these efforts proved unsuccessful she instituted this § 1983 action for damages on his behalf, alleging that petitioners knew about but failed to protect respondent against the repeated injuries he suffered.

In late 1976 respondent was transferred from his ward to the Pennhurst Hospital for treatment for a broken arm suffered, according to Pennhurst records, when he was "being seated" by a staff member on his ward. (Ex. P-5, p. 77.) In December 1977, respondent's complaint was amended to state claims that petitioners had denied him adequate habilitation in the Hospital (where he remained) and had unnecessarily shackled him to a chair or a bed for long periods every day. That complaint (the Second Amended Complaint) alleged that petitioners had taken those actions maliciously. (Pet. App. 86a-92a.)[4]

2. Trial began on April 17, 1978 and lasted for eight days. Pennhurst records established that respondent had been

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[3]She testified that she visited her son at Pennhurst several times a month and that conditions on his ward were "horrifying." On those visits:

> "He was afraid. He would come to me. He was so glad to see me. He would hug me and just pull me away from the unit, from the ward." (Tr. 1-43.)

Mrs. Romeo contacted her community mental health/mental retardation center which directed correspondence to petitioner Youngberg expressing "serious concern" over respondent's treatment at Pennhurst. (A. 13a-14a.) She also contacted her ward leader and Congressman, at whose instance the Secretary of the Department of Public Welfare of Pennsylvania directed petitioners to "facilitate, to the extent possible" respondent's transfer to another facility. (A. 15a-16a.) Petitioners never initiated such a transfer.

[4]Petitioners are administrators (not medical doctors or psychologists) at Pennhurst. C. Duane Youngberg was then the Superintendent of Pennhurst. Richard Matthews was then Director of Resident Life and Marguerite Conley was the director of Ward 52, respondent's ward.

injured on 77 occasions. (Pltfs' Exh. P-5.) The injuries included a broken arm, a fractured finger, injuries to his sexual organs, bites, lacerations, scratches, and black eyes. (Pet. App. 5a.) Some of the injuries became infected from lack of treatment or by contact with feces that had not been cleaned from the ward. (*Id.*) A Pennhurst aide on his ward testified that other aides threatened and abused respondent, and that one had knocked him down in the shower and punched him repeatedly in the face. (Tr. 2-131-35.) It was not contested that petitioners were responsible for the safety of respondent while at Pennhurst (Pet. App. 6a, n.3), and the evidence showed that they were aware of some or all of his injuries. (*Id.* 5a.)[5]

The evidence also showed that, despite the availability of programs for respondent's ward and the Pennhurst staff's

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[5]Petitioner Conley testified that she read the accident reports (including those regarding respondent's injuries) on respondent's ward on a daily basis. (Tr. 5-177.) Petitioner Matthews testified that his department received reports of the more serious injuries (including reports regarding respondent's injuries). (Tr. 6-22-24.) Petitioner Youngberg testified that he had twice received correspondence from respondent's community mental health/mental retardation center expressing their "serious concern" over respondent's injuries (A. 13a-14a; Tr. 6-79-80), and that he visited respondent's ward "at least" once a month because it was "the only way the superintendent can really know whether services are being delivered * * *." (Tr. 6-149-51.)

Petitioner Conley testified that it was part of her job to ensure that residents received programming (Tr. 5-171-73) and to investigate abuse of residents. (Tr. 5-183.) Petitioner Matthews, Ms. Conley's supervisor, was responsible for seeing that residents had a safe environment and directed the operation of the ward teams that developed the programming of residents. (Tr. 6-17-21.) Petitioner Youngberg testified that he had overall responsibility for the operation of the institution. (Tr. 6-76.)

knowledge that programming reduces aggressive behavior,[6] most of respondent's time was spent, as one aide testified, simply sitting or lying on the floor. (Tr. 4-52, 4-95-96.)

Petitioners admitted that since the filing of his initial complaint they had shackled respondent to his bed or a chair for long periods each day for more than a year. (Tr. 2-130; Pet. App. 14a n.20.)[7] The restraints were not used as part of any habilitation or treatment program; rather, they were purely custodial (*i.e.*, having no training or habilitative purpose). (Tr. 7-66-67, 7-76, 7-82.)[8]

Petitioners also admitted that respondent had received no habilitation whatever for six months following the filing of his initial complaint. (Tr. 6-161-64.)[9] Petitioners did not

[6]"It is generally conceded that most, if not all, outbursts of violence by the retarded can be prevented by adequate programming." *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1308 (E.D. Pa. 1977), *aff'd in relevant part*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *reversed and remanded on other grounds*, 451 U.S. 1 (1981).

[7]Respondent had moved about freely for the twenty-six years that he lived at home with his family (Tr. 1-35-36) and restraints had rarely been used upon him at Pennhurst prior to the initiation of the lawsuit. (Tr. 4-188, 5-218.)

[8]The custodial shackling of Nicholas Romeo is consistent with the unchallenged finding of fact in *Halderman, supra*, that restraints are used at Pennhurst as "control measures" which are "potentially physically harmful" and "prevent residents from learning or exercising self-care skills." 446 F. Supp. at 1306-1307.

[9]Petitioners' contention that they were unable to treat respondent "because of his mother's objections" (Pet. Br. 4) is inaccurate. After respondent had been injured some three score times at Pennhurst, petitioners presented to Mrs. Romeo for her approval a single program that would have resulted in respondent's hands being restrained when his behavior was inappropriate. (N.T. 6-34.) Mrs. Romeo rejected the program, fearing that respondent would be unable to defend himself, a fear that petitioner Matthews testified was an "appropriate concern." (Tr. 6-35.)

contend that any of their actions resulted from inadequate staff or resources; on the contrary, they testified that staffing and resources were adequate (Tr. 6-21, 6-135-36, 5-173) and, indeed, blocked discovery on the matter, taking the position that budgetary matters "are not even remotely related to this lawsuit."[10]

3. The district court ruled that the "deliberate indifference to serious medical needs" standard of *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), governed this case and, on the basis of that ruling, excluded respondent's proffered expert testimony. That testimony would have shown *inter alia* that:

(1) the lack of treatment provided to the residents at Pennhurst was a direct cause of the violence on the ward in which respondent resided;

(2) the programs needed to prevent such violence were available at Pennhurst and not utilized;

(3) the prolonged use of shackles on respondent after the lawsuit began had no treatment purpose whatsoever, but was used for the convenience of staff;

(4) given the lack of activity on the wards, the residents of Pennhurst learned violent behavior as their only means of receiving staff attention;

(5) respondent's injuries were excessive and potentially mutilating, and that appropriate programming of the residents would have prevented much of the violence leading to respondent's injuries.

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[10]Defendants' Response to Plaintiff's Motion to Compel Production of Documents, dated August 24, 1977, p. 11. The trial court agreed with petitioners and on September 7, 1977 denied respondent's motion.

(Pet. App. 97a-104a.) The trial court also relied on *Estelle v. Gamble* in instructing the jury:

> "If you find that the defendants were deliberately indifferent to the medical and psychological needs of Nicholas Romeo, then you may find that plaintiff's 8th and 14th Amendment rights were violated.
>
> * * *
>
> "You are not to decide whether Nicholas could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case.
>
> * * *
>
> "The mere fact that Nicholas was injured on one or more occasions does not permit you to draw the inference that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent."

(*Id.* 74a-75a.) On April 26, 1978 the jury returned a verdict for petitioners.

4. On November 24, 1980, the Third Circuit Court of Appeals, sitting *en banc,* unanimously vacated the district court judgment and remanded for a new trial. All nine judges of that court agreed that the district court had erred in its blanket exclusion of respondent's expert testimony and, following this Court's decision in *Bell v. Wolfish,* 441 U.S. 520 (1979), determined that the Eighth Amendment "deliberate indifference" standard should not be used to evaluate the rights of institutionalized retarded persons. (Pet. App. 6a-7a, 48a.)

Recognizing that any "specific instructions submitted to the jury" on remand "must be carefully structured to reflect the actual record that is developed," the majority then "set forth *** what may provide a beginning point for a set of jury instructions in a matter of this type." (*Id.* 41a.) The majority concluded that the "liberty" protected by the Due Process

Clause from arbitrary governmental deprivation includes a fundamental right to be free from physical restraints, but that that right could be overridden by a compelling reason making shackling necessary. (*Id.* 14a-21a, 46a.) The majority also ruled that respondent had a fundamental liberty interest in protection from assault and injury, but that that interest could be overridden if the conditions under which the injuries occurred were tolerated by the staff for a substantial reason (*e.g.*, that it was therapeutically important to have the residents mingling with each other rather than confined in isolation cells, even through the risk of injury might be increased). (*Id.* 21a-27a, 46a.) Finally, the majority concluded that respondent had a right to habilitation that was acceptable in light of present medical or other scientific knowledge. (*Id.* 38a-39a.)

The concurring judges agreed that respondent has protected rights to care and habilitation. (*Id.* 54a.) They proposed, however, that petitioners could be liable only if their conduct was "such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment"; that is, that "the choice in question was not a sham or otherwise illegitimate." (*Id.* 59a, 66a.)

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent's interest in this Court, as in the court of appeals, is to secure a new trial at which he will be permitted to adduce evidence from his expert witnesses showing a violation of his constitutional rights. The rights he asserts are the rights to minimally decent care, reasonable protection

from harm, freedom from unnecessary, purely custodial shackling, and minimally adequate habilitation. All nine court of appeals judges agreed that the Constitution generally affords such rights to retarded individuals who are involuntarily confined by the State. They disagreed over the precise definition of those rights, but their unanimous view was (a) that the evidence respondent sought but was not allowed to adduce was relevant to the question whether those rights had been violated, and (b) that the district court judgment must therefore be reversed and a new trial granted.

1. In Part IA below we show that retarded persons in the State's custody are constitutionally entitled to minimally decent care, both by virtue of the substantive protections of the Due Process Clause and by virtue, in this case, of a state-created liberty interest in care as a condition of confinement. In Part IB we show that minimally decent care must include reasonable protection from harm, and that respondent's right to personal security is independently protected by the Due Process Clause quite apart from its inclusion as an element of decent care. So far petitioners do not disagree: they concede that they must provide respondent care, including reasonable protection from harm.

This case involves prolonged shackling that is only "custodial," *i.e.*, shackling that has no medical or treatment or habilitative purposes whatever. Freedom from unnecessary, purely custodial shackling is also an element of minimally decent care, as we show in Part IC. It is, moreover, independently protected by the Constitution, for freedom from unnecessary bodily restraints lies at the core of the "liberty" safeguarded by the Due Process Clause. The States appearing as *amici* agree "that excessive and inappropriate use of physical restraints may constitute violations of their clients' " constitutional rights.

If the State does not provide minimally adequate habilitation to retarded persons who, while they are in the State's custody, have no one else to turn to for help, those persons are guaranteed not to attain the basic life skills the lack of which caused their confinement in the first place. Indeed, their ability even to retain the skills which they brought with them into the institution will be lost without habilitative efforts. In Part ID we show that a pattern of prolonged institutional neglect will inevitably work harm and is therefore inconsistent with the provision of minimally decent care. We also show that, apart from its inclusion in minimally decent care, minimally adequate habilitation is required by the Constitution of its own force. The Court need not decide that issue in this case, however, for the Pennsylvania statute pursuant to which respondent was committed creates a liberty interest in the continued provision of habilitation, just as it creates a protected liberty interest in continued care, that cannot be arbitrarily abrogated.

2. In Part II we show that, contrary to petitioners' contentions, it does not trivialize the Constitution to say that it takes cognizance of respondent's claims that he (a) suffered a pattern of over seventy injuries, many of them serious and some of them actually mutilating, (b) was simply tied up, to a bed or a chair, for most of his waking hours for over a year solely for the convenience of the staff, and (c) that he was denied minimally adequate habilitation for more than a year. We also show that respondent is not seeking to constitutionalize state torts. This is not a case in which state officials cause or permit liberty deprivations "in ways that are equally available to private citizens," *Parratt v. Taylor,* 49 U.S.L.W. 4509, 4515 (1981) (Powell, J., concurring), and respondent's claims, like prisoner com-

plaints under §1983 raising serious Eighth Amendment claims regarding conditions of confinement, cannot be turned away.

3. In Part III we discuss the standards of review appropriate to the constitutional claims at stake. We contend (a) that petitioners' tolerance of the conditions endangering respondent's personal security was unlawful unless it was reasonably related to their pursuit of the care or habilitation or protection of respondent or other residents; (b) that the imposition of purely custodial shackles on respondent for over a year was unlawful unless it was necessary (the standard required by federal regulations and by Pennsylvania state law and the one recognized by petitioners themselves); and (c) that respondent is entitled to minimally adequate habilitation.

We do not discuss the circumstances, if any, under which the "least restrictive alternative" principle applies to habilitation of retarded persons. That issue is not presented in this case. Respondent's claims in this case are not premised on a right to "least restrictive" habilitation or treatment. The court of appeals discussed the issue in connection with its *sua sponte* consideration of physically intrusive treatments like prefrontal lobotomies, which are no part of this case.

As Judge Aldisert noted below, there is wisdom in adhering to the common law tradition of case-by-case adjudication, tying rulings in individual cases to the facts of record and avoiding the unnecessary disposition of issues not squarely presented or not presented at all. That traditional approach is especially appropriate in this case. The Court will be unable at this intermediate stage to review the claims of the parties against the background of a full factual record. Not just the respondent's case will look different at a

trial at which his relevant proof is unrestricted: the defense will likely be adjusted in response. Moreover, the case raises sensitive issues of constitutional adjudication, issues that may arise in a variety of different factual and state-law settings. Accordingly, the invitations from petitioners and various *amici* to address issues that are not presented on this record should be declined lest the Court issue constitutional rulings on what are, in this case, only abstract questions.[11]

4. In Part IV we show that respondent's excluded evidence was relevant to his claims under any appropriate standard of review. Unless the Court disagrees with all of our contentions and holds that respondent could not on any set of facts under any standard of review establish a constitutional violation of any of the rights he has asserted, the judgment of the court of appeals granting respondent a new trial must be affirmed.

5. In Part V we show that petitioners are not entitled to immunity as a matter of law because neither the record of the trial below, at which respondent's evidence was wrongly excluded, nor the state of the law at the time their conduct occurred will support their claim.

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[11]Last Term, reflecting the approach we urge, this Court dismissed its writ of certiorari in *Minnick v. California Department of Corrections*, 49 U.S.L.W. 4609 (1981), declining to address constitutional issues in a case where the record contained ambiguities and the case was going back for further proceedings in the trial court. Similarly, in *Upjohn Co. v. United States*, 49 U.S.L.W. 4093 (1981), this Court said, "We are acutely aware * * * that we sit to decide concrete questions and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area [concerning the scope of the attorney-client privilege in the corporate context], even were we able to do so." *Id.* 4093. See also *Hodel v. Virginia Surface Mining Ass'n*, 49 U.S.L.W. 4654 (1981), where the Court declined to pass on the constitutionality of a statute in the absence of "an actual factual setting that makes such a decision necessary." *Id.* 4662.

ARGUMENT

I.

RESPONDENT IS ENTITLED TO DECENT CARE, REASONABLE PROTECTION FROM HARM, FREEDOM FROM UNNECESSARY CUSTODIAL SHACKLING, AND MINIMALLY ADEQUATE HABILITATION.

A. The State Must Afford Decent Care to Involuntarily Confined Retarded Persons.

It seems to us beyond dispute that the State owes a duty to afford minimally decent care to persons in its custody. That right to decent care arises directly under the Constitution itself and extends to all involuntarily confined persons, whatever the reason for their confinement. In addition, as we show below, in this case respondent enjoys a right to decent care by virtue of a state-created liberty interest that is protected against arbitrary abrogation by the Due Process Clause.

1. The right to decent care arises directly under the Constitution.

The Cruel and Unusual Punishment Clause of the Eighth Amendment, which governs the prison conditions that may be imposed on persons convicted of crimes, "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency * * *.' " *Estelle v. Gamble,* 429 U.S.

97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). Overcrowded conditions and an inadequate diet have been found to violate the Eighth Amendment, see *Hutto v. Finney*, 437 U.S. 678 (1978), and other conditions of confinement that result in "serious deprivations of basic human needs" or fall below "contemporary standards of decency," *Rhodes v. Chapman*, 49 U.S.L.W. 4677, 4679 & n.13 (1981), have also been "rightly * * * condemned" as unconstitutionally cruel and unusual. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

If the Eighth Amendment mandates, in prisons, care consistent with the provision "of the minimal civilized measure of life's necessities," *Rhodes v. Chapman, supra*, 49 U.S.L.W. at 4679, the Due Process Clause, governing conditions in mental hospitals, can surely require no less.[12] The rights of convicts, imprisoned on account of knowing anti-social behavior, can be the same as, or less than, but never greater than, the rights of the retarded whose confinement comes about solely because of their innocent inability to care for themselves.[13]

In *Bell v. Wolfish, supra*, the Court held that, in evaluating conditions of pretrial detention implicating liberty interests under the Due Process Clause, "the proper inquiry

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[12]In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court declined to consider whether "persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment" (*id.* 669 n.37), but the combination of that decision and the decision in *Bell v. Wolfish* seems to us, as it did to the court of appeals, to firmly establish that the Eighth Amendment applies only in cases concerning punishment of persons convicted of crimes. *Bell v. Wolfish*, 441 U.S. at 535 n.16; *Ingraham v. Wright*, 430 U.S. at 669-72 & n.40.

[13]See *Bell v. Wolfish, supra*, 441 U.S. at 545: "[P]retrial detainees, who have not been convicted of any crimes, retain *at least* those constitutional rights that we have held are enjoyed by convicted prisoners." (Emphasis added.)

is whether those conditions amount to punishment of the detainee." 441 U.S. at 535 (footnote omitted). In our view that standard is inadequate here. *Bell v. Wolfish* involved the rights of persons confined (a) upon a showing of probable cause that they had committed a federal offense, *id.* 536, and (b) in a prison with convicted inmates as well as other pretrial detainees. *Id.* 524. In reviewing the challenged conditions the Court refused to distinguish between pretrial detainees and convicted inmates, finding that both groups posed equal security risks and that "in certain circumstances [pretrial detainees may] present a greater risk to jail security and order." *Id.* 546 & n.28. The Court also noted that "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* 559. Furthermore, over eighty-five percent of the pretrial detainees were released within sixty days, *id.* 524-25 n.3: that short term of confinement played an important role in the Court's rulings. See *id.* 543, 555 n.35, 562. By contrast, retarded persons who are confined because they are unable to care for themselves are not suspected of crime, do not share quarters with convicted criminals where the smuggling of weapons and other contraband is a common occurrence, and often spend all or major portions of their lives in confinement.[14] Accordingly, their right to decent care should be measured more generously than the rights of the pretrial detainees in *Bell.*

Even if we are wrong, however, such that the sole due process liberty interest of an involuntarily confined retarded person is the "right to be free from punishment," *id.* 534, it is clear that the denial of decent care would amount to

[14]The average length of stay for residents at Pennhurst is 21 years. *Halderman, supra,* 446 F. Supp. at 302.

punishment and therefore violate due process. That is because there can be no legitimate interest justifying the denial of decent care. The denial would not be "reasonably related to a legitimate goal" and would therefore amount to "punishment that may not be constitutionally inflicted * * *." *Id.* 539; see *id.* 539 n.20.

2. The State has created a protected interest in decent care.

It is settled that state statutes can create liberty interests entitled to protection under the Due Process Clause. *Vitek v. Jones,* 445 U.S. 480, 488-89 (1980); *Wolff v. McDonnell,* 418 U.S. 539, 557-58 (1974). Confinement in a state facility for the retarded involves "a massive curtailment of liberty." *Humphrey v. Cady,* 405 U.S. 504, 509 (1972). Here, as the State's statute expressly provides, that confinement was for the purpose (among others, see *infra*) of providing respondent "care." (Pa. Stat. Ann. tit. 50 §4406(b).) The promise of care may be sufficient to justify an *initial* deprivation of liberty, but only the provision of care can thereafter justify the *continued* commitment. As the Court said in *Wolff v. McDonnell,* "[t]he touchstone of due process is protection of the individual against arbitrary action of government." 418 U.S. at 558. There can scarcely be anything more arbitrary than for the State to confine a person in order to afford him the care he cannot provide himself and then withhold that care. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana,* 406 U.S. 715, 738 (1972); see *O'Connor v. Donaldson,* 422 U.S. 563 (1975).

The care mandated by the statute and, therefore, by the Due Process Clause, must be decent care. The State could not reasonably argue to the contrary, and petitioners do not: they concede that they owe a constitutional duty to plaintiff "to satisfy his basic needs for food, shelter, reasonable safety and medical care." (Pet. Br. 8; see *id.* 11, 12, n.10.) The States appearing as *amici* also recognize their duty to provide "food, shelter, supervision and care." (States *Amici* Br. 8.)

Thus the State owes a duty to the respondent, arising directly under the Due Process Clause as well as by virtue of a state-created liberty interest protected by the Constitution, to provide him decent care.

B. Respondent Must Be Reasonably Protected From Harm.

1. Decent care includes reasonable protection from harm.

Whatever the full scope of a civilized concept of "decent care," in the context of involuntary confinement of persons unable to care for themselves it surely must include, at an irreducible minimum, the provision of living conditions that are reasonably safe, which in turn includes protection from repeated attacks from other residents. Petitioners agree: they concede that the State is under a constitutional duty to provide respondent "reasonable safety." (Pet. Br. 8, 11, 12, n.10.) The States appearing as *amici* also "acknowledge that they have a responsibility to protect their clients from harm." (States *Amici* Br. 8.)[15]

[15]When an institutionalized person who is not responsible for his actions engages frequently in self-destructive activities, protection from harm necessarily includes protection from self-inflicted harm.

2. There is an independent constitutional right to reasonable protection from harm.

Quite apart from its inclusion as an indispensable element of constitutionally required decent care, the right to personal security constitutes an "historic liberty interest" independently protected by the Due Process Clause. *Ingraham v. Wright,* 430 U.S. 651, 673 (1977). That right is not extinguished by the fact of lawful confinement. Even in the case of prisons, where "restrictive and even harsh" conditions "are part of the penalty that criminal offenders pay for their offenses against society," *Rhodes v. Chapman,* 49 U.S.L.W. at 4679, inmates are constitutionally entitled to reasonable protection from harm, including protection from their fellow inmates. See *Hutto v. Finney, supra* (affirming measures designed *inter alia* to protect prisoners from rampant violence).[16]

Similarly, "[t]here is no iron curtain drawn between the Constitution and the [mental institutions] of this country." *Wolff v. McDonnell, supra,* 418 U.S. at 555-56. Every lower federal court that has considered the question has determined that state officials who are responsible for

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[16]Cf. *Bell v. Wolfish, supra,* 441 U.S. at 547 (recognizing that prison officials "must be free to take appropriate action to ensure the safety of inmates"); *Wolff v. McDonnell, supra,* 418 U.S. at 566 (prison officials have "the responsibility for the safety of inmates and staff").

The lower courts have consistently held that prisoners have a constitutional right to be reasonably protected from harm at the hands of other prisoners. See, *e.g., Jones v. Diamond,* 636 F.2d 1364, 1372-74 (5th Cir. 1981) (*en banc*); *Withers v. Levine,* 615 F.2d 158 (4th Cir. 1980); *Woodhous v. Virginia,* 487 F.2d 889 (4th Cir. 1973); *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971), *aff'd sub nom. Hutto v. Finney, supra; Roberts v. Williams,* 302 F. Supp. 972 (N.D. Miss. 1969), *aff'd in relevant part, remanded in part,* 456 F.2d 819 (5th Cir. 1971).

operating institutions for the retarded or mentally ill have a constitutionally imposed duty to safeguard the personal security of involuntarily committed residents.[17]

Thus, respondent is entitled to reasonable protection from harm, both because that right is subsumed in his right to decent care and because it is independently recognized by the Due Process Clause.[18]

C. Respondent Must Be Free of Unnecessary Custodial Shackling.

1. Decent care includes the right to freedom from unnecessary custodial shackling.

The responsible use of restraints may form part of a reasonable professional program of habilitation. This case,

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[17]See, *e.g.*, *Rogers v. Okin*, 634 F.2d 650, 655-56 (1st Cir.), *cert. granted*, 101 S.Ct. 1972 (1980); *Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978) (residents have "a constitutional right to a humane and safe living environment * * * which includes a duty to protect inmates from assault by fellow inmates and staff"); *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (mental patient's 14th Amendment right to personal security imposes duty on defendants "to protect him from attack by fellow inmates"); *Halderman v. Pennhurst State School & Hospital, supra; Knight v. Colorado*, 496 F. Supp. 779, 780 (D. Colo. 1980); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in relevant part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973); cf. *Harper v. Cserr*, 544 F.2d 1121, 1122-1124 (1st Cir. 1976).

[18]Here again we believe that the *Bell v. Wolfish* standard, protecting pretrial detainees' Due Process liberty interests only against conditions that amount to punishment is (a) insufficient but is (b) satisfied anyway, since the State can have no legitimate interest that would justify denying involuntarily committed retarded persons reasonable protection from attack by other residents. Hence such denial does amount to punishment under the *Bell* test.

however, raises no issue regarding the use of restraints for treatment or habilitation purposes.[19] Rather, it involves only "custodial" shackling imposed, according to respondent, solely for the convenience of the staff. Prolonged custodial shackling that is unnecessary is simply stark abuse and cannot be squared with any definition of minimally decent care. The *amici* States acknowledge "that excessive and inappropriate use of physical restraints may constitute violations of their clients' " constitutional rights. (States *Amici* Br. 8, 29.)

2. There is an independent constitutional right to freedom from unnecessary custodial shackling.

Apart from its inclusion in the right to minimally decent care, respondent's right to freedom from unnecessary custodial shackling is part of any citizen's liberty interest, independently protected by the Due Process Clause, in freedom from unreasonable physical restraint. See *Parham v. J.R.*, 442 U.S. 584, 600-01 (1979); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977). Indeed, freedom from bodily restraint is the presumptive starting point in any analysis of the content of protected liberty. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Meyer v. Nebraska*, 262 U.S. 390,

[19] Petitioners admitted in their answer that for more than a year they "had caused [respondent] to be shackled to his bed or otherwise physically restrained for long periods of time each day." See paragraph 22 of petitioner's Second Amended Answer (A. 9a), admitting paragraph 22 of the Second Amended Complaint. (Pet. App. 89a.) At trial their witnesses testified that the shackling was not part of any habilitative program but was imposed for purely custodial reasons (Tr. 7-66-67, 7-76, 7-82); and petitioners have never, at any stage of this litigation, contended otherwise.

399 (1923); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). That is because "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action" and is a "fundamental liberty." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18-19 (1979) (opinion of Powell, J.).[20]

Having been involuntarily but lawfully institutionalized, respondent inevitably suffered some constitutionally permissible restrictions on his freedom of movement. His right to freedom from restraint was limited by the purposes for which he was confined and was "subject to restrictions imposed by the nature of the regime to which [he was] lawfully committed." *Wolff v. McDonnell, supra*, 418 U.S. at 556. But not all of respondent's liberties were left at the institution's gates. A continuous practice of prolonged and unnecesary custodial shackling is no less oppressive than the excessive condition of isolation barred by the Eighth Amendment (cf. *Hutto v. Finney, supra*), and the Due Process Clause cannot reasonably be said to permit what the Eighth Amendment would not.

Hence, both because it is inconsistent with their right to minimally decent care and because it violates their fundamental liberty interest in freedom from unnecessary custodial restraints, confined retarded persons are constitu-

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[20]Thus petitioners err in arguing that "[i]n creating a constitutional right to be free of restraints or shackles, the Third Circuit broke totally new ground." (Pet. Br. 27 (footnote omitted).)

tionally protected against being lashed to their beds simply because they are less trouble that way.[21]

D. Respondent Must Be Afforded Minimally Adequate Habilitation.

1. Decent care of the retarded includes minimally adequate habilitation.

We have shown above that the right to decent care of persons confined by the State includes the right to be protected from harm and to be free of prolonged and unnecessary custodial restraints such as shackles. The correlative duties associated with those rights, we believe, are owed to anyone whom the State would confine. In the case of retarded persons, however, the provision of minimally decent care must also include the provision of minimally adequate habilitative efforts. The reason is that, without habilitation, institutionalized retarded persons will suffer harm (both physical and psychological) that the State is under a duty to prevent as part of its obligation to provide minimally decent care.

The denial of habilitation results in harm to retarded persons in several ways. First, the denial of habilitative

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[21]Assuming once more that the *Bell* "punishment" test applies, it is satisfied by purely custodial shackling for over a year solely for the convenience of staff: the State can have no legitimate interest justifying that kind of shackling for that duration. Cf. *Bell v. Wolfish, supra,* 441 U.S. at 539 n.20: "[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish."

training to persons who have been committed because of their inability to care for themselves will inevitably prolong their commitment, perhaps unnecessarily turning a short-term confinement into a life-long one. Second, without adequate programming, left with nothing to do all day, some retarded persons are likely to engage in self-destructive behavior and aggression towards other residents.[22] That is the thrust of part of the expert testimony that plaintiff sought to offer at trial. The State cannot confine retarded persons on the premise of affording them decent care and then simply warehouse them in conditions so barren of constructive stimuli that only aggressive and/or self-destructive behavior is rewarded.

Third, it is well documented that without minimal habilitative efforts—basic training in fundamental life skills—institutionalized retarded persons not only will fail to develop such skills independently but also will lose the skills they may have brought with them into the institution.[23] The resulting inability to deal with life's basic tasks will inevitably lead to a variety of inappropriate, aggressive and self-destructive behaviors. Indeed, putting aside increased risks of physical harm, if a retarded individual loses all of his

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[22]That is especially true in the case of persons who have been confined because of their tendency towards violent behavior: the absence of habilitation will reinforce rather than ameliorate that tendency, potentially or actually endangering other residents.

[23]See, *e.g.*, Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 Am. J. Mental Deficiency 666 (1970); Vogel, *Effects of Environmental Enrichment and Environmental Deprivation on Cognitive Functioning in Institutionalized Retardates*, 31 J. Consulting Psych. 570 (1967); Guthrie, Butter, & Gorton, *Personality Differences Between Institutionalized and Non-institutionalized Retardates*, 67 Am. J. Mental Deficiency 543 (1963); see also *Halderman, supra*, 446 F. Supp. at 1322.

previously acquired skills through prolonged institutional neglect, then the State has worked positive injury, in violation of its duty to provide decent care. In our view it would plainly violate the Constitution for the State to quarantine a population afflicted by an infectious disease and then deny treatment, permitting the disease to worsen. It is the same with confinement of retarded persons. Once they have been confined they have no one but the State to turn to for help in gaining additional skills or, at least, preserving whatever skills and abilities they have.

The Constitution does not ask miracles of the State and neither do we. But without provision of minimally adequate habilitation, the State knowingly visits positive harm on confined retarded individuals that the Constitution must be deemed to prohibit.[24]

2. There is an independent constitutional right to minimally adequate habilitation.

Quite apart from its relationship to decent care, a right to habilitation arises directly under the Constitution and by virtue, in this case, of a state-created right that is protected under the Due Process Clause.

a. The right to habilitation arises directly under the Constitution.

The *amicus* briefs of the American Orthopsychiatric Association *et al.* and the American Psychiatric Associa-

[24]Since the State can have no legitimate interest warranting the infliction of harm on a retarded person by the denial of minimally adequate habilitation, the *Bell v. Wolfish* punishment standard (assuming it is all that applies) is satisfied.

tion fully set forth the reasons why retarded persons have a residual, constitutional liberty interest in receiving minimally adequate habilitation following involuntary confinement. We agree with their views on that issue and will not repeat them here. Only one contention made by petitioners and the *amici* States warrants comment.

Petitioners argue (Pet. Br. 19) that the State has legitimate interests in

> "provision of care or treatment, protection of other residents, and persons in the facility, and efficient and economical operation of the institution. So long as the conditions of confinement are reasonably related to *any* of these objectives * * * no substantive due process violation has occurred." (Emphasis added.)

That argument fails to address at all whether respondent has a constitutional right to minimally adequate habilitation.[25] It also leads to the conclusion that the State could choose to maintain conditions reasonably related to the objective of providing treatment and thereby extinguish a resident's right to decent care. It may be that states are generally free to "deal with one problem at a time" (Pet. Br. 18), but it does not follow that if the State respects a constitutional right to decent care (which, in any event, in this case it did not) it can treat residents' other constitutional rights as "problems" to be dealt with another day. It must respect *all* constitutional rights of persons in its custody.

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[25]The *amici* States make the same argument at pages 18-20 of their brief.

In short, if respondent has no right to habilitation it is because he has no right to habilitation, not because he has some other right that the State does not infringe.[26]

b. The State has created a protected interest in habilitation.

The Court need not decide in this case whether a right to habilitation is guaranteed by the Constitution of its own force. That is because, in this case, there is a state statute that creates a liberty interest in habilitation that is protected by the Due Process Clause from arbitrary abrogation.

We showed above that, the State having committed respondent for the statutorily expressed purpose of providing him care, it could not justify a continued confinement without providing that care: the state statute created a valid liberty interest in the expectation of care which the State may not thereafter arbitrarily abridge. See *Vitek v. Jones, supra; Wolff v. McDonnell, supra; O'Connor v. Donaldson, supra* (when the State confines a person for a stated purpose it must fulfill that purpose); *Jackson v. Indiana, supra.* Petitioners do not contest that view. (Pet. Br. 17-18.) It is the same with habilitation under the Pennsylvania statute pursuant to which respondent was committed (the

[26]Petitioners' and the *amici* States' briefs contain suggestions that the Court should not recognize a constitutional right to minimally adequate habilitation because the condition of being retarded cannot be "cured." (Pet. Br. 17, States *Amici* Br. 3-5.) The professional associations that have appeared as *amici* in this case sharply disagree with that suggestion, and we can perceive no reason why the right to minimally adequate habilitation should depend upon the prospect of a cure rather than amelioration of the disabilities of retardation. In any event, it *is* certain that retarded persons will not gain or even maintain life's basic skills if they are warehoused and ignored.

Mental Health and Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § § 4401 *et seq.*).

That statute provides in relevant part as follows (*id.* § 4406):

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment * * * a petition may be presented to the court of common pleas * * * for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.
>
> (b) If, upon examination, it is determined that such person is in need of care at a facility * * * [the court] may order the commitment of such person for care and treatment.

Petitioners cite only subsection (a) of the statute in support of their argument that the retarded can be committed in Pennsylvania for either care *or* treatment. But the important language is found in subsection (b), which provides that actual commitment for purposes other than the initial examination shall be for the purpose of "care *and* treatment" (emphasis added).[27]

[27]Beyond that, other provisions of the 1966 Act (a) make it the State's duty "[t]o assure * * * the availability and equitable provision of adequate mental health and mental retardation services" (§ 4201); (b) impose on the counties the duty to establish a "mental retardation program * * * for the diagnosis, care, treatment, rehabilitation and detention of the mentally disabled" (§ 4301(a)); (c) provide for voluntary admissions to state facilities "for examination, treatment and care" (§ § 4402, 4403); and (d) place directors of facilities "in charge of the diagnosis, treatment and care" of residents, unless the director is not a physician, in which case a physician should be in charge "of all medical diagnosis, treatment and care to be rendered to such persons" (§ 4417(a)). In the exercise of his rulemaking powers under § 4301 of the Act, the Secretary of Welfare promulgated a regulation stating that the county programs are "the means by which minimum services as described in the act shall be readily available to promote the social, personal, physical and economical habilitation or rehabilitation of mentally retarded person[s] * * *." See *In re Schmidt*, 429 A.2d 631, 636 (Pa. 1981).

Nor do petitioners mention the state and federal court decisions that have demonstrated that the 1966 Act confers a right to habilitation. In *In re Joyce Z.*, No. 2035-69 (Pa. Com. Pl. Ct. Allegheny Cty. 1969), the court ruled that there is "a right to treatment given * * * by the" Act.[28] In *In re Schmidt,* 429 A.2d 631, 636 (Pa. 1981), the Pennsylvania Supreme Court made clear that the Act had adopted a principle of "normalization" (the concept that retarded persons are entitled "to live a life as close as possible to that which is typical for the general population"), and therefore required "that the least restriction consistent with adequate treatment and required care shall be employed," a requirement implemented by providing "minimum services" including services to "promote the social, personal, physical and economic habilitation and rehabilitation of mentally retarded person[s] * * *."

The federal courts are unanimous in holding that the 1966 Act confers a right to treatment. Both the majority and concurring opinions below so hold. (Pet. App. 34a-35a, 55a.) So do *Eubanks v. Clarke,* 434 F. Supp. 1022, 1026-27 (E.D. Pa. 1977) (Lord, C.J.), and *Halderman, supra,* 446 F. Supp. at 1322-23.[29] A long line of this Court's cases

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[28]See also *In re Guzman,* 45 Pa. Cmwlth. 525, 405 A.2d 1036, 1038 (1979) ("[W]hen the state involuntarily commits retarded persons it must provide 'minimally adequate habilitation.' ") (Inner citation omitted.) (It is unclear whether that was a state statutory or a constitutional ruling.)

[29]The legislative history of the Act firmly supports those holdings. Senator Pechan, the principal sponsor of the Act, stated when he introduced the bill:

> "The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it. * * * It will make available the services of psychiatrists and psychologists, of psychiatric nurses and social

(continued)

teaches that this consistent view of the local federal courts regarding a matter of state law warrants "great deference" and should be accepted by this Court.[30]

It follows that petitioners are simply incorrect in arguing that the state statute does not create a right to habilitation as well as to decent care. That state-created guarantee of habilitation constitutes a liberty interest that is entitled to the protection of the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell, supra,* 418 U.S. at 557. Having committed respondent for the legitimate purpose of affording him habilitation the State may not, consistent with due process, continue that confinement while at the same time arbitrarily denying the habilitation guaranteed by the statute.[31] See *Jackson v. Indiana, supra; O'Connor v. Donaldson, supra.*

(footnote continued from preceding page)

> workers, of specially trained occupational therapists, of speech and hearing therapists, of activities directors and child care workers. It will supplement the benefits of therapy with daytime and evening programs of activity * * *.
>
> "* * * We are not about to close our State schools and hospitals or our State mental hospitals. The great point is that we shall know that the treatment of one of these institutions is the indicated treatment before the patient leaves his community. * * *."

Pa. Legislative Journal, p. 76 (September 27, 1966).

[30] *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944). *Accord, Rummell v. Estelle,* 445 U.S. 263, 267 n.7 (1980); *Bishop v. Wood,* 426 U.S. 341, 346 & n.10 (1976); *United States v. Durham Lumber Co.,* 363 U.S. 522, 526-27 (1976); *Estate of Spiegel v. Comm'r,* 355 U.S. 701, 708 (1949); *Propper v. Clark,* 337 U.S. 472, 486-487 (1949); *Township of Hillsborough v. Cromwell,* 326 U.S. 620, 629-30 (1946); *MacGregor v. Mutual Life Assurance Co.,* 315 U.S. 280, 281 (1942).

[31] That habilitation must be minimally adequate, just as the care owed by the State must be minimally decent care.

Thus there is no need for the Court in this case to decide whether the Constitution of its own force and without regard to state statutory law entitles retarded persons to minimally adequate habilitation when confined in state institutions.

II.

RESPONDENT'S ALLEGATIONS STATE CONSTITUTIONAL CLAIMS.

We recognize that constitutional violations do not occur every time an institutionalized person is injured or restrained. "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright,* 430 U.S. at 674, quoted in *Bell v. Wolfish,* 441 U.S. at 539 n.21. See *Knight v. Colorado, supra* (holding that an isolated incident causing no harm to a mentally ill resident did not amount to a constitutional wrong). Similarly, short-term or intermittent denials of minimally adequate care or habilitation may rise only to the "*de minimis* level" and not be actionable.

But whatever the contour of the line setting off the trivial from the serious, this case falls on the side of constitutionally respected claims. Respondent's allegations and such evidence as he was allowed to adduce at trial show (a) a pattern of some seventy injuries, several of them extremely serious and many of them potentially or actually mutilating, that occurred during a relatively short period and

that were known to petitioners;[32] (b) that he was shackled to a bed or chair for up to twelve hours every day for more than a year for no reason other than the convenience of the staff; and (c) that he was denied minimally adequate habilitation for a period of years. It does no disservice to the Constitution to say that it takes cognizance of claims of abridged liberty so serious as these.

Petitioners are incorrect in suggesting (Pet. Br. 13-14) that in bringing this case respondent asks the courts to engage in impermissible second guessing of hospital administrators. There is nothing "baffling" (*id.*) about a claim that the State may neither take a retarded person into its custody for provision of decent care and then turn its back on him while he suffers a prolonged pattern of serious injuries, nor shackle him to a bed or a chair and ignore him for long periods, day after day. Moreover, "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties," *Pell v. Procunier*, 417 U.S. 817, 827 (1974), and "a policy of judicial restraint," such as that urged by petitioners, "cannot encompass any failure to take cognizance of valid constitutional claims * * * arising in a * * * state institution," for "federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974).

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[32]Petitioners mischaracterize the decision of the court of appeals in stating (Pet. Br. 19) that it "clearly established a constitutional cause of action for nearly any personal injury which may occur in a state mental institution." On the contrary, the court of appeals rightly recognized the *de minimis* limitation—and that respondent's allegations and proof surmounted it. The court held (Pet. App. 23):

> "The right to protection is not activated by an isolated mishap, or called into question by each bruise that a patient may suffer. But a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right."

Respondent's claim to minimally adequate habilitation is no more mysterious. This Court has stated that "[w]here 'treatment' is the sole ground asserted for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present," *O'Connor v. Donaldson, supra,* 442 U.S. at 574 n.10, and that "[t]he medical nature of [an] inquiry * * * does not justify dispensing with due process requirements." *Vitek v. Jones, supra,* 445 U.S. at 495. It is no more difficult—and no less necessary—for a court to determine whether minimally adequate habilitation exists than to determine whether any habilitation whatever is present: indeed, habilitation that is not minimally adequate is not habilitation at all.

Nor, contrary to petitioners' claim, does respondent seek to constitutionalize what would otherwise be run-of-the-mill state torts. An analysis of that claim must start from the premise that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape,* 365 U.S. 167, 183 (1961).

Beyond that, the decisions of this Court cited by petitioners (Pet. Br. 13-14) in support of the notion that the existence of state remedies can satisfy a constitutional due process requirement are inapplicable to this case. In *Ingraham v. Wright* the Court ruled that state protections were adequate to protect school children from wrongful corporal punishment in public schools. That case, however, turned on the openness of the public school environment and the traditional common law privilege of teachers to administer corporal punishment to their students. The closed environment of the mental institution contrasts sharply with

the open public school setting, and there is no analogous privilege permitting hospital administrators to fail to protect residents, or unnecessarily shackle them, or deny them minimally adequate habilitation. Moreover, the case did not address any issue of substantive due process involved here. See 430 U.S. at 689 n.5 (White, J., dissenting).

In *Parratt v. Taylor*, 49 U.S.L.W. 4509 (1981), the Court ruled that the prison inmate's protected property interest had been abridged, but not without due process. The negligent loss of the inmate's "hobby materials" had occurred "as a result of a random and unauthorized act by a state employee" rather than any state practice or policy, *id.* at 4512, and the availability of post-deprivation state remedies was held sufficient to satisfy the requirements of procedural due process. Our case involves not an accidental and unauthorized abridgement of a minor property interest but knowing and prolonged denials of substantial liberty interests.[33] Nothing in *Parratt* closes the federal courts to such claims.

In sum, given the institutional setting and the gravity of respondent's claims, *Ingraham* and *Parratt* are inapplicable here.[34] This is not a common law tort case in which state officials cause or permit liberty deprivations "in ways that

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[33]See the concurring opinions of Justices White and Blackmun, stating that the rationale of *Parratt* would not apply to intrusions on liberty interests. 49 U.S.L.W. at 4513-14.

[34]In contrast to *Ingraham* and *Parratt*, which found that constitutional liberty and property interests existed but were adequately protected by state remedies, *Paul v. Davis*, 424 U.S. 693 (1976), cited by petitioners (Pet. Br. 13-14), did not hold that the availability of state remedies can defeat a constitutional claim: it held that the respondent claimed no liberty or property rights secured against state deprivation in the first place.

are equally available to private citizens." *Parratt*, 49 U.S.L.W. at 4515 (Powell, J., concurring). Prisoner complaints under §1983 raising serious Eighth Amendment claims regarding the conditions under which they are imprisoned are not turned away; it can be no different for the claims of retarded persons under the Due Process Clause. Respondent's claims are not *de minimis*, do not trivialize the Constitution, and cannot be defeated by the uncertain availability of state law remedies.[35]

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[35]The existence of adequate state remedies in this case is at best uncertain. Petitioners assert (Pet. Br. 13) that *Freach v. Shovlin*, 471 Pa. 583, 370 A.2d 1163 (1977), gave respondent a private right of action under Pennsylvania's Mental Health and Mental Retardation Act of 1966, *supra*. *Freach*, however, simply held that, in an ordinary wrongful death and survival action brought by the parents of two children killed by a former mental patient who, it was alleged, should not have been released from custody, §603 of the Act replaced absolute immunity for officials holding positions like petitioner Youngberg with a qualified immunity that excluded gross negligence, incompetence, or actions that are intentional, malicious, wanton, or reckless. The case does not even mention a possible cause of action under the Act, and even in the context of ordinary tort actions articulates an immunity standard that may prohibit claims that the objective prong of §1983's qualified immunity, see *Wood v. Strickland*, 420 U.S. 308 (1975), would not (*i.e.*, those where the official should have known, but did not know, that his actions were wrongful).

Nor does respondent have a remedy directly against the State. At the time respondent filed his suit, Pennsylvania was immune by virtue of sovereign immunity. *Freach v. Shovlin*, *supra*. The Pennsylvania Supreme Court later abrogated the doctrine of sovereign immunity, *Mayle v. Pennsylvania Dept. of Highways*, 479 Pa. 384, 388 A.2d 709 (1978), but not until after the trial in this case was completed. Respondent cannot now file a claim against Pennsylvania in state court because the statute of limitations has run. *Leasoff v. Commonwealth*, 428 A.2d 783 (Pa. 1981); *Royal-Globe Ins. Co. v. Hauck Mfg. Co.*, 233 Pa. Super. 248, 335 A.2d 460 (1975). The Pennsylvania legislature has now re-established sovereign immunity in Pennsylvania with limited exceptions. Pa. Stat. Ann. tit. 42 §§8521, 8522. Even assuming that one of those exceptions might be otherwise applicable to the facts of this case, *but see Steinberg v. Commonwealth*, 46 Pa. Cmwlth. 105, 405 A.2d 1135 (1979), the statute of limitations would nevertheless bar a suit by respondent against the State.

III.

STANDARDS OF REVIEW.

We have shown above that retarded persons in state institutions are entitled to reasonable protection from harm, freedom from prolonged unnecessary custodial shackling, and minimally adequate habilitation, both because those entitlements are part of the decent care owed by the State and because they are independently protected liberty interests under the Constitution. Here we discuss the appropriate standards for review of respondent's claims.

"Constitutional adjudication being a matter of 'great gravity and delicacy,' " *Kremens v. Bartley*, 431 U.S. 119, 128 (1977) (quoting *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring)), there is a "long-established rule that this Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " 431 U.S. at 136, quoting *Liverpool, N.Y. & P.S.S. Co. v. Commissioner of Emigration*, 113 U.S. 33, 39 (1885). That long established rule has special relevance here, where petitioners and *amici* seek rulings on issues—most notably issues regarding the "least restrictive alternative" theory in connection with treatment or habilitation programs—that on the facts of this case are not raised and need not be reached. Moreover, as we show *infra*, the selection of any particular standard of review from among the alternatives that seem reasonably worthy of consideration will not change the result in this Court, for under any of them respondent's excluded evidence was relevant and a new trial is required.

A. Reasonable Protection Against Harm.

1. Two standards governing the constitutional duty of care owed to prisoners have been enunciated by this Court. In *Rhodes v. Chapman,* 49 U.S.L.W. at 4679, the Court held that the Constitution forbids "the wanton and unnecessary infliction of pain."[36] In *Estelle v. Gamble,* 429 U.S. at 104, the Court held that the Constitution forbids "deliberate indifference to serious medical needs of prisoners."[37] Neither standard is adequate here, for the same reasons.

First, both are standards established under the Cruel and Unusual Punishment Clause of the Eighth Amendment, and this Court has held that that Clause applies only in cases of punitive incarceration for criminal acts. *Bell v. Wolfish,* 441 U.S. at 535 n.16; *Ingraham v. Wright,* 430 U.S. at 669-72 & n.40.

Second, the rationale behind imprisonment and the prison environment are markedly different from the rationale behind confinement of retarded persons and the environment of mental institutions. It cannot be said that the State owes to innocent individuals who are involuntarily confined solely because of their inability to care for themselves only that duty of care it owes to individuals imprisoned for the purpose (among others) of punishment for crimes against society. Just as "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts

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[36] *Rhodes v. Chapman* did not announce but reiterated that standard, citing *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) (joint opinion), and *Estelle v. Gamble,* 429 U.S. at 103.

[37] The "deliberate indifference" instruction was given by the district court in this case and is favored by the *amici* States (States *Amici* Br. 29-30).

of criminal conviction and incarceration," *Ingraham v. Wright*, 430 U.S. at 669, so do the helpless retarded stand in different circumstances from "those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Wolff v. McDonnell*, 418 U.S. at 561. The retarded are the misfortunate, not the malevolent.

As the concurring opinion below pointed out (Pet. App. 56a, 59a), the State has an *affirmative duty* to discover and respond to the needs of confined retarded persons who are unable to care for themselves, a duty greater in kind, in our view, than it owes to convicted prisoners. Moreover, the very nature of the prison population, comprised of the deliberately lawless, many of whom "are recidivists who have repeatedly employed illegal and often very violent means to attain their ends," *Wolff v. McDonnell*, 418 U.S. at 561-62, may justify a level of personal security that need not be tolerated in an institution for the retarded, of whom the same things cannot be said. It follows, in our view, that the appropriate definition of the constitutional right to care must impose a higher duty in the case of institutions for the retarded than in the case of prisons.

2. The court of appeals ruled that, if the respondent suffered repeated injuries of which petitioners were aware, then petitioners could be held liable unless their actions were justified by "substantial necessity" or, stated differently, "important state interests" or "substantial explanations." (Pet. App. 25a-26a, 46a.) Petitioners contend that they should be held liable only if their conduct was not "reasonably related to legitimate state interests." (Pet. Br. 32; see also *id.* at 9, 15, 18-19.) In fact, however, the court of appeals and petitioners (and respondent) agree (with one exception discussed below) on the state interests that can be asserted, with the result that it makes no difference whether those interests are called "substantial" or simply "legitimate."

The court of appeals stated, in formulating proposed jury instructions, that:

> "For example, if the staff considered it important, for therapeutic purposes, to have the resident mingling with others instead of confined to an isolated cell, even though some risk of injury existed, you may consider that to be a substantial explanation." (Pet App. 46a.)

What the court of appeals called a "substantial" interest is thus for all practical purposes the same as what petitioners call their "legitimate" interests in providing "care or treatment, protection of the person, [and] protection of other residents and persons in the facility * * *." (Pet. Br. 19.)[38] We agree that, whether the "substantial" or "legitimate" rubric is employed, it would be a defense if petitioners' conduct was reasonably related to the State's interest in providing care and habilitation and the institutional order needed to provide that care and habilitation.[39]

[38]The court of appeals did not address whether the State's interest in protecting residents qualified as a "substantial" state interest, since the very issue was what sorts of interests the State had to be serving in protecting residents. But, since the court ruled that the pursuit of proper therapeutic goals was a "substantial" interest, it is reasonable to assume that reasonable efforts to protect what the court found to be "fundamental" liberty interests in personal security would also be deemed "substantial" by the court of appeals.

[39]Respondent requested the district court to instruct the jury that petitioners could be held liable if, knowing of the pattern of attacks he suffered, they failed to take reasonable steps to protect him. (Pet. App. 93a.) The district court gave that instruction (A. 73a-75a), but then negated it by also telling the jury that "to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident," that "you are not to decide whether Nicholas could have been treated in some * * * better way," and that "[t]he mere fact that Nicholas was injured on one or more occasions does not permit you to draw the inference that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent." (A. 74a-75a.) The court of appeals held that the "deliberate indifference" instruction was grounds for reversal (Pet. App. 24a-25a; 55a-58a) along with the district court's erroneous exclusion of respondent's expert testimony.

We and the court of appeals part company with petitioners on one issue, however. Petitioners say that one state interest, the reasonable pursuit of which may constitute a defense, is the "efficient and economical operation of the institution." (Pet. Br. 19.) The court of appeals disagreed: it ruled that "overcrowded conditions or inadequate staffing patterns may not justify the injuries." (Pet. App. 46a.) Put differently, the court of appeals ruled that, at least where physical safety is at stake, the "efficient and economical operation of the institution" was not a "substantial" state interest.[40]

On the facts of this case petitioners are not entitled to raise, and the Court need not decide, the question whether state budgetary concerns can ever justify toleration of unconstitutional institutional conditions. That is because petitioners made no such claim in either court below. Rather, they testified at trial that their resources and staffing were fully adequate. (Tr. 6-21, 6-135-36, 5-173.) They did not request any instruction from the district court that the jury should take efficiency or economy into account. Indeed, when respondent moved to compel production of documents such as budgets or budget requests, petitioners successfully resisted on the ground that those documents were "not even remotely related to this lawsuit."[41] And in the court of appeals petitioners made no mention of

[40]By contrast, as to claims regarding a denial of minimally adequate habilitation, the court of appeals ruled that fiscal constraints could be taken into account. (Pet. App. 38a, 47a.)

[41]See note 10, *supra*. Their position at trial explains why, as petitioners point out, "there is no evidence that [petitioners] had any control over the amount of money available to provide services at Pennhurst." (Pet. Br. 22.)

budgetary or efficiency concerns. In short, whether petitioners could defend their conduct on the ground that it was reasonably related to the "efficient and economical operation of the institution" was no part of this case in either the district court or the court of appeals, and therefore presents a question that this Court need not and should not decide.

If the Court does reach the issue, however, it should reject petitioners' view. At stake is the "historic liberty interest" in personal, bodily security (*Ingraham v. Wright*, 430 U.S. at 673), a fundamental liberty interest that at some point becomes an interest in life itself.[42] Serious intrusions on that interest, such as occurred in this case, ought to require explanations going beyond the State's interest in its pocketbook. "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations * * *." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.). The State should not be privileged to confine retarded persons under long-term life-threatening conditions and then defend its action on the ground that it hasn't the money to protect fundamental consitutional rights.[43]

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[42]See *Wyatt v. Aderholt*, 503 F.2d 1305, 1311 & n.6 (5th Cir. 1974) (describing the circumstances under which four residents of a state mental facility died "due to understaffing, lack of supervision, and brutality").

[43]Cf. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972): "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

Finally, we note that the concurrence below erred in suggesting (Pet. App. 51a) that the majority opinion imposed on the jury the task of determining what is a "substantial" interest under the Constitution. Rather, the majority clearly recognized that that determination poses a legal question for the courts. The jury's task, then, is not to identify the sorts of interests (whether called "substantial" or "legitimate") that the State may assert, but to determine whether the defendant's conduct was in fact reasonably related to serving the interests identified by the district court as germane, or was an "exaggerated" response (*Bell v. Wolfish*, 441 U.S. at 548, 551, 555, 561-62) or was simply not related to those interests at all.[44]

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[44]The concurring court of appeals judges would instruct the jury that the respondent can prevail on his claim regarding protection from harm only if he can show that petitioners' actions amounted to "such a substantial departure from accepted professional judgement * * * as to demonstrate that [petitioners] did not base their conduct on a professional judgment * * * but rather that the choice in quesiton was * * * a sham." (Pet. App. 59a.) That standard is essentially the same as the Eighth Amendment "deliberate indifference" standard, for the elements of proof under both would be the same. The concurring judges thought such a standard necessary to keep out medical malpractice actions too inconsequential for the Constitution to notice. We have already shown, however, that the Eighth Amendment standard is inadequate in this case, and that this is not a dressed-up state tort action, any more than was *Bell v. Wolfish* or the numerous challenges to prison conditions heard by the federal courts under the Eighth Amendment. (Moreover, the petitioners are not doctors and could not be sued upon a claim of medical malpractice.) There is no other justification offered by the concurrence for imposing so high a hurdle to relief in this case, and it is inconsistent with the concurrence's recognition that the State has "an affirmative obligation to discover the needs of mentally retarded patients for protection and to respond to those needs in an adequate manner." (Pet. App. 56a, 59a.)

B. Freedom From Unnecessary Custodial Shackling.

1. The Eighth Amendment "deliberate indifference to serious medical needs" standard is inappropriate to claims of unnecessary shackling both for the reasons stated above going to the differences between convicted prisoners and retarded persons and for the additional reason that a standard designed to test whether sufficient attention has been paid to "serious medical needs" has nothing to do with the question whether unnecessary, purely custodial shackling of a resident violates his liberty interest in freedom from bodily restraint.

2. The court of appeals held that the district court on remand should instruct the jury that respondent could prevail unless the shackling to which he was subjected "was essential to protect the [respondent] or to treat him." (Pet. App. 18a.) That standard, as the court of appeals noted, requires that shackling be the "least restrictive alternative" available.[45] Petitioners, the *amici* States, and the American Psychiatric Association devote substantial portions of their briefs to arguing that the "least restrictive alternative" standard is not suitable to judge claims regarding shackling because shackling has justifiable uses as part of proper habilitation programs. That issue is not presented in this case. Petitioners do not contend that their prolonged shackling of respondent was part of any treatment program: on the contrary, their evidence showed that the purpose of the shackling was purely custodial. (See page 4, *supra*.)

At least in cases (like this one) involving purely custodial shackling for many hours each day for many months on end,

[45]If less restrictive alternatives are effective then shackles are not "essential" or "necessary."

we believe that a "necessary" or "compelling" test is appropriate.[46] The right to be free of unnecessary bodily restraints lies at the core of the fundamental liberty interest protected by the Due Process Clause. In many cases involving intrusions on rights that the Court has deemed fundamental—but that, in our view, weigh less heavily in the scales than the paramount right to be free from unnecessary bodily restraints[47]—the Court has required the State to show "compelling" or at least "important" reasons for the intrusion.[48]

[46]In *Bell v. Wolfish, supra,* the Court disapproved the "compelling necessity" test adopted by the Second Circuit because "the detainee's desire to be free from discomfort * * * simply does not rise to the level of those fundamental liberty interests delineated in cases such as" *Roe v. Wade,* 410 U.S. 113 (1973); *Stanley v. Illinois, supra;* and *Griswold v. Connecticut,* 381 U.S. 479 (1965) (among others). 441 U.S. at 534-535. The interest in freedom from unnecessary bodily restraints asserted in this case cannot reasonably be compared to a "desire to be free from discomfort"; it is, if anything, more fundamental than the rights recognized in the decisions cited as inapposite in *Bell.*

[47]The Due Process Clause protects a variety of interests; some are more important than others. See *Griswold v. Connecticut,* 381 U.S. 479, 502-503 (1965) (White, J., concurring); *Poe v. Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal of appeal).

[48]*E.g., Zablocki v. Redhail,* 434 U.S. 374, 388 (1978) (interference with fundamental right to marry must be justified by "important" state interests); *Procunier v. Martinez, supra,* 416 U.S. at 413 (censorship of prison mail must be justified by an "important or substantial governmental interest"); *Roe v. Wade, supra,* 410 U.S. at 155, 162-163 (interference with woman's right to terminate pregnancy requires "compelling" reasons); *Stanley v. Illinois, supra,* 405 U.S. at 651 (state must have a "powerful countervailing interest" to interfere with unmarried father's right to custody of children); *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 627 (1969) (restrictions on resident's right to vote must promote a "compelling" state interest); *Shapiro v. Thompson,* 394 U.S. 618, 634, 638 (1969) (only "compelling" state interests can interfere with fundamental right to travel); *Griswold v.*

(continued)

In the circumstances of this case there is no force to the view of petitioners and some *amici* that requiring the State to show that that shackling was "essential" or "necessary" will impermissibly intrude on professional decisionmaking. The "necessary" standard for purely custodial shackling is the one employed by professionals in the field, as respondent's expert testimony would have shown. (Pet. App. 99a.) It is the one endorsed by the *amici* American Orthopsychiatric Association *et al.*, whose members will have to meet it. (Br. 24.) It is the one required by federal regulations under the Social Security Act.[49] And it is, in fact, the one mandated by Pennsylvania law and, *as both petitioners*

(footnote continued from preceding page)

Connecticut, supra, 381 U.S. at 485 (regulation of marital privacy rights regarding contraception cannot "sweep unnecessarily broadly"); *Stanley v. Georgia*, 394 U.S. 557, 568 & n.11 (1969) (private possession of pornography is part of "the individual's right to read or observe what he pleases" which is "fundamental" and cannot be overriden except for "compelling" reasons); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (intrusion on basic liberty to procreate invokes "strict scrutiny" test); cf. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) ("the usual judicial deference to the legislature is inappropriate" when the government seeks to regulate the family); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (gender-based distinction requires "important" governmental objectives).

[49]Petitioners attempt to distinguish the necessity standard from that employed by federal regulations applicable to the use of restraints at Pennhurst. (Pet. Br. 28 n.38.) In fact, 42 C.F.R. 442.438 (1980) provides in relevant part (emphasis added):

> "(a) Except as provided for behavior modification programs in §442.422, the [facility] may allow the use of physical restraint on a resident *only if absolutely necessary* to protect the resident from injuring himself or others.
>
> (b) The [facility] may not use physical restraint—
>
> (1) As punishment;
>
> (2) For the convenience of the staff; or
>
> (3) As a substitute for activities or treatment."

Youngberg and Matthews testified, purportedly observed at Pennhurst. (Tr. 6-73, 6-86.)[50]

In short, at least in cases like this one, where (a) there is no claim that the use of shackles was part of any program of treatment, and (b) respondent was simply tied up for most of his waking hours for over a year, the Constitution requires a showing of necessity. That standard will not impede reasonable institutional administration, for it is not an undue interference with official discretion for the courts to inquire whether professional standards having the force of law have been met.[51]

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[50]Petitioners would distinguish the "necessary" standard from the requirements of the Pennsylvania statute. (Pet. Br. at 28 n.39.) But §4422 of the 1966 Act provides (emphasis added):

> "Mechanical restraints shall not be used or applied to a mentally disabled person, except:
>
> (1)When *necessary* to prevent such person from harming himself or others when being transported as provided in sections 405 or 421, * * * or
>
> (2) Whenever the director of a facility or his designee determine that such are *required* by the medical needs of such person admitted or committed, in which case the same may be used or applied only in accordance with regulations of the department."

In *In re Schmidt, supra,* the Pennsylvania Supreme Court held that the 1966 Act had adopted the principle of "normalization" and that "[c]onsistent with this concept is the requirement that the least restriction consistent with adequate treatment and required care shall be employed." 429 A.2d at 636.

[51]Here again we note that the jury will not be called upon to determine what are "compelling" state interests. Rather, it will determine whether the purely custodial shackling at issue was necessary for the State to serve its goals of providing care and habilitation in a setting of institutional order.

C. Minimally Adequate Habilitation.

The court of appeals ruled that respondent on remand is entitled to an instruction that the petitioners might be held liable if they had denied him habilitation that is "acceptable for him in light of present medical or other scientific knowledge." (Pet. App. 38a.) We believe that standard to be correct. So do the professional associations of psychiatrists and psychologists appearing as *amici*.[52] It is, moreover, no different in substance than the standard generally adopted by petitioners for gauging the lawfulness of state action, *i.e.*, that it be reasonably related to legitimate state interests. (Pet. Br. 33.) The State can have no legitimate interest in providing a retarded person habilitation that is not minimally acceptable.[53]

Petitioners, the *amici* States, and the American Psychiatric Association challenge the wisdom of the court of appeals' statement that treatment involving grave physical intrusions such as prefrontal lobotomies may require a "least restrictive alternative" standard. It is important that the Court understand that that issue is not presented in this

---

[52]The American Orthopsychiatric Association *et al.* state that residents are entitled to habilitation that is "adequate in light of current professional knowledge." (Br. 3.)

The American Psychiatric Association states that residents are entitled to "adequate habilitation" (Br. 4-10) and that conduct falling below "acceptable standards" would infringe that constitutional right (*id.* 23).

[53]Petitioners mischaracterize our position in stating that we contend for a right to habilitation that will "maximize [respondent's] developmental potential." (Pet. Br. 8; see also *id.* at 11, 12 n.10.) Our position is that minimally, not maximally, adequate habilitation is required.

case.[54] No such intrusions are involved here. The court of appeals' remarks on the issue were wholly *dicta.* The court of appeals ruled that respondent was *not* entitled to a "least restrictive alternative" instruction in connection with his claim that he had not received minimally adequate habilitation. In the circumstances of this case we do not contest that ruling.[55] We seek instead to support the court of appeals' ruling that on the facts of this case respondent is entitled to a "minimally acceptable" instruction. Whether and under what circumstances, if any, a "least restrictive alternative" instruction might be warranted in connection with a claim regarding treatment poses, in this case, only an "abstract proposition[] of law," *Upjohn Co. v. United States,* 49

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[54]Thus *Sanchez v. New Mexico,* 396 U.S. 276 (1970), *dismissing for want of a substantial federal question* 80 N.M. 438, 457 P.2d 370 (1969), cited in the briefs of petitioners (p. 23, 26), the *amici* States (p. 25), and the *amicus* American Psychiatric Association (p. 17 & n.18), is irrelevant. *Sanchez* at most decided that a mentally ill person found to be dangerous to himself was not deprived of due process when not treated in a less restrictive setting than total institutionalization. Here no right to the least restrictive treatment—much less a right to the least restrictive placement—is at issue. In any event, summary dispositions such as *Sanchez* have considerably less weight than decisions reached after plenary consideration. *Caban v. Mohammed,* 441 U.S. 380, 390 n.9 (1979); *Illinois Election Bd. v. Socialist Workers Party,* 440 U.S. 173, 180-81 (1979); *Edelman v. Jordan,* 415 U.S. 651, 671 (1974).

[55]Thus respondent does not contend that (and the case does not present the question whether) "the provision of acceptable medical treatment within an institution may nonetheless violate the liberty interests of its residents." (Brief of American Psychiatric Association as *Amicus* 23.)

U.S.L.W. at 4093, *supra* n.11, that this Court need not and should not address.[56]

IV.

RESPONDENT'S EXCLUDED EVIDENCE WAS RELEVANT.

The district court excluded respondent's expert testimony on the ground that it was evidence only of malpractice. All nine judges on the court of appeals agreed that that was error: it does not follow that because an item of evidence could be relevant to a malpractice claim it is therefore irrelevant to a constitutional claim. We show below that the excluded testimony was relevant even if respondent's claims are to be judged under the Eighth Amendment "deliberate indifference" standard. *A fortiorari,* it was relevant under the Due Process Clause standards for which we have contended. Under any standard, then, the evidence was wrongly excluded and a new trial is required.[57]

[56]Nor is there any force to the view of the concurrence below that the standard for which we contend (and which is endorsed by all the *amici* professional associations) gives simple malpractice claims constitutional status. The *de minimis* principle stated in *Ingraham v. Wright* and *Bell v. Wolfish* is sufficient to bar trivial claims from the federal courts. Moreover, even *Estelle v. Gamble* recognized that prisoner complaints regarding treatment could rise to constitutional claims even if they would also be actionable under state tort law. The higher, "deliberate indifference" standard adopted in that case reflected the prison context in which the claim arose and, for the reasons stated earlier (see pages 29-30, *supra*) is insufficient in this case, where respondent was committed for the very purpose of receiving treatment.

[57]The question is not whether the proferred evidence would by itself necessarily have proved respondent's case, but whether that evidence had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

A. The Evidence Was Relevant to Respondent's Protection From Harm Claim.

The record showed a prolonged and repeated pattern of injuries to respondent of which petitioners concededly were aware. Petitioners themselves testified that there was adequate staffing to provide proper supervision on the wards. Respondent's expert testimony would have shown, however, that his injuries were the direct result of inadequate supervision and the lack of programs and activities on his ward. (Pet. App. 98a.) The expert would have further testified about numerous proven programs that reduce aggressive behavior of retarded persons and that those programs were available at Pennhurst yet were not used by petitioners. (*Id.*) In the context of the other evidence of record, that testimony would have tended to show that petitioners' failure to provide such supervision and programming reflected a "deliberate indifference" to respondent's physical safety.[58]

The evidence was also relevant under any applicable due process standard. Assuming the applicability of the standard proposed by the concurrence below, the evidence would have tended to show that petitioners' conduct was so

[58]Cf. *Layne v. Vinzant*, No. 80-1152, slip op. at 4 (1st Cir. July 31, 1981) (even under the Eighth Amendment standard, "[w]hen a supervisory official is placed on actual notice of a prisoner's need for physical protection or medical care, 'administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety' ") (citations omitted); *Murphy v. United States*, No. 78-0251, slip op. at 14 (D.C. Cir. May 18, 1981) (under Eighth Amendment standard of deliberate indifference the requisite malice "can be inferred from evidence that assaults are sufficiently pervasive to reasonably apprise prison officials of the need for protective measures" even where there is no direct evidence of willful or deliberate violations of the officials' duty of protection).

substantial a departure from accepted professional judgment and standards that the conduct could not be said to have been based on a professional judgment at all. The evidence also would have tended to establish that the conditions that led to respondent's injuries were not reasonably related to any state interest in providing decent care and reasonable safety (which petitioners concede they are under a duty to provide) or in providing habilitation. For example, the testimony would have shown that the means for preventing injury were readily available and would not have interfered with any state interest in promoting the social interaction or individual independence of the residents, and the jury could have inferred from that testimony that petitioners' toleration of the conditions leading to the physical abuse shown on this record therefore represented an exaggerated and illegitimate response to that interest, if indeed it was related to it at all.[59]

Thus, the proffered evidence was relevant under any standard that might reasonably be applied to respondent's claims. Accordingly, the evidence was improperly excluded and the court of appeals was correct in ordering a new trial at which that evidence will be received.

B. The Evidence Was Relevant to Respondent's Shackling Claim.

Respondent's expert testimony would have shown that he was shackled for excessive periods and that the shackles were imposed, not for any medical or habilitation purpose

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[59]Evidence tending to show that petitioners' actions were not reasonably related to a legitimate state interest would also be admissible under the standards of *Bell v. Wolfish*. See pp. 12-13, *supra*.

(which petitioners conceded), but solely for the convenience of the staff. (Pet. App. 101a.) It would further have shown that the excessive shackling actually caused a deterioration in self-help skills and an increase in aggressive behavior.[60]

That proffered testimony went directly to the question whether petitioners' use of shackles violated respondent's constitutional rights however they are defined.[61] It would have tended to show that the petitioners' continuing and knowing actions caused respondent harm and manifested everything from "deliberate indifference" to conduct not reasonably related to any legitimate state interest. It was accordingly relevant under any standard and should have been admitted.

C. The Evidence Was Relevant to Respondent's Habilitation Claim.

Respondent sought to adduce expert testimony showing that he has the potential to learn (and thus retain) increased basic skills; that petitioners had denied him suitable habilitation programs that were available at Pennhurst; that the habilitation program that they did use was not minimally adequate because it was not administered according to professional standards; and that as a result of the denial of minimally adequate habilitation respondent's self-help skills had deteriorated during his institutionalization. (Pet. App. 99a-104a.)

[60]See *Halderman, supra,* 446 F. Supp. at 1306-07 (restraints in lieu of habilitation are used at Pennhurst on a routine basis simply to control patients).

[61]Petitioners argue that the district court judgment should be reinstated because there is no evidence of improper use of restraints. (Pet. Br. 33-34.) There is no such evidence only because it was improperly excluded.

The jury could have inferred from this testimony that the persistent failure to provide minimally acceptable habilitation—habilitation that was available and the denial of which caused such harm to respondent—bespoke a deliberate indifference to respondent's needs. It could therefore also have inferred that petitioners' denial of minimally adequate habilitation was not reasonably related to any legitimate state interest in providing care or institutional order. The evidence was therefore relevant under any applicable standard and was improperly excluded.

V.

PETITIONERS ARE NOT ENTITLED TO IMMUNITY AS A MATTER OF LAW.

Petitioners argue that this Court should grant them immunity as a matter of law[62] because there is no evidence of subjective bad faith in the record sufficient to avoid the immunity defense under the formula of *Wood v. Strickland*, 420 U.S. 308 (1975). (Pet. Br. 35.) If there is no such

[62]It is doubtful that petitioners raised the issue of qualified immunity as such in the court of appeals. Chief Judge Seitz thought they had not. (Pet. App. 48a n.1: "The existence of a qualified immunity defense is not raised on this appeal.") In any event, petitioners surely raised no issue of immunity required as a matter of law, and the court of appeals' *sua sponte* discussion of the possible applicability of a qualified immunity defense on retrial (Pet. App. 43a-44a) did not address that issue. The question is therefore not properly before the Court and need not be decided. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 49 U.S.L.W. 4516, 4519 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed ***."); *Delta Air Lines, Inc. v. August*, 49 U.S.L.W. 4241, 4245 (1981) (*semble*).

evidence, however, that is only because it was improperly excluded at trial. The evidence proffered in the district court would have tended to prove that there was no permissible justification for the denial of minimally adequate habilitation or for the restraints used, and that petitioners' actions caused respondent's physical and psychological injuries. Particularly when combined with the evidence of record showing a continuous and persistent pattern of injury, unnecesary custodial shackling, and lack of minimally adequate habilitation, that additional evidence would easily support an inference of bad faith or malice.[63]

Thus *Procunier v. Navarette*, 434 U.S. 555 (1978), relied on by petitioners, is inapposite. There the Court held that immunity was warranted because the First Amendment rights at issue had not been clearly established when the officials acted (*id.* 565) and because an allegation of negligence could not implicate a malicious intent to harm. *Id.* 566. Here respondent has specifically alleged malice and intent to harm (Pet. App. 90a-91a),[64] and sought to adduce evidence that would have supported such allegations.[65]

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[63]See cases cited n.58, *supra*.

[64]Respondent's complaint (filed before *Bell v. Wolfish* came down) also alleged Eighth Amendment violations—*i.e.*, "wanton infliction of pain" *Gregg v. Georgia*, *supra*, or "deliberate indifference," *Estelle v. Gamble*, *supra*, which if proved would defeat a good faith immunity. (Pet. App. 90a.)

[65]Moreover, while *O'Connor v. Donaldson*, *supra*, established a qualified immunity that could be applicable to petitioner Youngberg, that decision by its terms would not reach lower level administrators like petitioners Conley and Matthews. Even if qualified immunity exists as to them, its scope might vary with their varying levels of discretion. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). Since "the burden is on the official claiming immunity to demonstrate his entitlement" to it, *Dennis v. Sparks*, 49 U.S.L.W. 4001, 4002 (1980), the incomplete record on this point is further ground for deferring decision.

Navarette is also distinguishable with regard to the objective prong of the good faith defense, for petitioners concede that respondent had a right to decent care. The state statute under which respondent was committed created such an entitlement, and even in the prison context it has long been clear that officials must maintain reasonable conditions consistent with fundamental decency. (See pp. 12-13, *supra.*) Petitioners could not have reasonably believed they owed respondent a lesser duty. Nor could they have reasonably believed that unjustified exposure to the pattern and degree of injury shown on this record or unjustified shackling of the magnitude shown here would not violate that constitutional duty. Respondent's evidence, had it been admitted, would have shown the exposure to injuries and shackling to have been unreasonable and unjustified by any legitimate medical or administrative consideration. Simply because of the established and conceded right to decent care, then, petitioners are not entitled to immunity as a matter of law.

Moreover, apart from the right to decent care, prisoner cases had established a right to reasonably safe conditions and reasonable protection from harm well before the times relevant here, *e.g., Woodhous v. Virginia,* 487 F.2d 889 (4th Cir. 1973); *Holt v. Sarver,* 302 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971), *aff'd sub nom. Hutto v. Finney, supra; Roberts v. Williams,* 302 F. Supp. 972 (N.D. Miss. 1969), *aff'd in relevant part, remanded in part,* 456 F.2d 819 (5th Cir. 1971), and the federal courts had established similar obligations for state officials responsible for operating institutions for retarded or mentally ill persons, *e.g., Welsch v. Likins,* 373 F. Supp. 487 (D. Minn. 1974), *aff'd in relevant part, vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977); *New*

York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). Beyond that, the Pennsylvania statute had created an entitlement to habilitation upon its enactment in 1966, and by 1976 the federal courts were consistently upholding, on constitutional grounds, *at least* a right to minimally adequate habilitation. *E.g., Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F. 2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975); *Saville v. Treadway*, 404 F. Supp. 480 (M.D. Tenn. 1974) (three-judge court), *consent agreement approved*, 404 F. Supp. 483; *Welsch v. Likins*, *supra*; *see Nelson v. Heyne*, 491 F. 2d 352 (7th Cir. 1974); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *compare New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, *supra*, *with New York State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975). In these circumstances there is no substance to petitioners' claim that they are entitled to immunity as a matter of law.

Nor is this an appropriate case for the Court to entertain the suggestion made by *amicus* American Psychiatric Association (Br. 24-26) that a new form of immunity under § 1983 should be judicially created for state officials who in good faith seek to comply with constitutional standards but are thwarted by inadequate state funding. Petitioners did not contend in the trial below that their actions were in any way influenced by financial constraints; rather, they testified that staffing was wholly adequate. Furthermore, the evidence proffered by respondent would have shown that the programs necessary for his minimally adequate care and habilitation were available at Pennhurst. On this record, which would indeed support a finding of affirmative bad faith, consideration of the American Psychiatric Association's suggestion would be premature.

In any event, the American Psychiatric Association stands alone among the professional organizations appearing as *amici* in contending for an expanded immunity. The American Orthopsychiatric Association *et al.* take a contrary view. They essentially recognize (Br. 29-30) that, since states themselves are not subject to suit for damages, see *Edelman v. Jordan,* 415 U.S. 651 (1974), the creation of expanded forms of official immunity would both restrict the remedies of those persons §1983 was designed to protect and impede the deterrent purpose the statute is supposed to serve. *E.g., Robertson v. Wegmann,* 436 U.S. 584, 590-91 (1978). Moreover, the ones in charge of running state institutions are probably in the best position to seek adequate funding to keep those institutions from denying constitutional rights: so viewed, the concern (raised by petitioners, the American Psychiatric Association, and the *amici* States) that professionals will refuse to work in unconstitutional institutions could have a more positive influence on the legislature than a negative impact on the institutionalized.[46] Accordingly, if the Court does reach the American Psychiatric Association's suggestion, it should reject it.

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[46]That concern is, in any event, unrealistic in this case, for two reasons. First, if petitioners are correct in stating that there are already adequate state remedies in this case (but see note 35, *supra*), there is no reason to believe that the existence of federal remedies will drive professionals, content to work under the threat of state-imposed liability for constitutional wrongs, from their jobs. Second, petitioners' entire argument on the issue is makeweight, since Pennsylvania provides for indemnification of its officials against damages in §1983 cases. 4 Pa. Code §§39.2-.3. The Pennsylvania Attorney General's representation of petitioners means that they will in fact be indemnified against any judgment in this case. *Id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. PLAINTIFF'S STATEMENT OF THE FACTS CONTAINS NUMEROUS STATEMENTS WHICH ARE ERRONEOUS OR MISLEADING OR WHICH WERE THE SUBJECT OF CONFLICTING TESTIMONY BEFORE THE JURY.

Respondent's brief[1] is replete with statements which either are not supported by any evidence in the record or were the subject of conflicting testimony before the jury.[2] It is the function of the jury to weigh conflicting evidence, and to judge the credibility of witnesses. *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946). So long as there is some evidentiary basis for the jury's resolution of factual disputes, on appeal the reviewing court will not disturb the verdict. *Id.* Because the jury found for them, defendants in this case are entitled to any inferences which may reasonably be drawn from the evidence. With this in mind, several important misstatements in plaintiff's brief must be noted.

1. Plaintiff's most glaring error in stating the "facts" is his repeated assertion that shackles were used on him for purely custodial purposes, *i.e.*, for the convenience of the staff (Resp. Bf. 4, 5, 10, 18-20, 30). To the contrary, restraints were used on plaintiff to protect him or others

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[1] The following abbreviations will be used herein: "Resp. Bf."—Brief for Respondent; "Pet. Bf."—Brief for Petitioner; "J.A."—Joint Appendix; "Pet. App."—Appendix to the Petition for Writ of Certiorari; "R."—Notes of Testimony; and "D.Ex."—Defendants' Exhibit.

[2] Plaintiff's errors on this point may spring either from his heavy reliance on the Third Circuit majority's description of the "facts", despite the absence of any special findings by the jury (Resp. Bf. 1, 2, 3, 4, 6), or from his reliance on the District Court decision in *Halderman v. Pennhurst State School and Hospital*, 445 F. Supp. 1295 (E.D. Pa. 1977), *aff'd*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *rev'd*, 451 U.S. 1 (1981) (Resp. Bf. 4, 14, 50). Neither is relevant here.

from his violent tendencies, and then, only when prescribed by a physician (R. 4-183; 5-221; 6-59, 67, 141; 7-39-40, 49, 76-78).

From the time Romeo arrived at Pennhurst in 1974, he was abusive to himself, other residents and the staff. *See, e.g.*, 6-188, 213, 7-72.[3] In February 1976, a psychologist developed a comprehensive program designed to reduce his aggressive behavior (R. 2-7; 5-88-90; 6-200-03; D. Ex. 1, 9),[4] but that program was never implemented because his mother, Paula Romeo, refused to agree to it (R. 1-53; 4-25; 6-204)). In September 1976, Romeo was placed in the hospital ward after breaking his arm (R. 5-256, 6-138). Shortly thereafter, he filed the complaint in this case (J.A. 1a).[5]

When his arm had healed and he normally would have returned to his ward, the parties, by their counsel, agreed that he should remain in the hospital due to the pending litigation (R. 5-248; 6-57-58, 137).[6] While in the hospital, Romeo's violent behavior posed a special threat to other patients (R. 7-40, 49, 76-78), some of whom were in traction or had intravenous tubes attached to them (R. 7-40). Thus, Dr. Gabroy, a physician who is not a defendant in this case, prescribed restraints[7] to protect Romeo and others, not for administrative convenience

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[3] Indeed, Romeo demonstrated similar behavior even before he was committed to Pennhurst (D. Ex. 12; R. 7-69-70; 73).

[4] That program called for short periods of separation from other residents ("time-out"), as well as periodic use of "muffs" on plaintiff's hands for a short period of time, to prevent him from attacking himself or others (R. 5-88; 6-88; 6-200-03).

[5] The original complaint makes no mention of a shackling claim.

[6] Three witnesses testified at trial that Romeo remained in the hospital pursuant to such an agreement (R. 5-248; 6-57-58, 137). Plaintiff offered no evidence to the contrary.

[7] "Soft" restraints, for the arms only, were generally used (R. 7-53-55, 79).

(R. 7-40, 49, 76-78).[8] Based on that prescription, plaintiff amended his complaint in 1977 to raise a shackling claim (Pet. App. 91a).

2. Plaintiff has also suggested that he received very limited programming while at Pennhurst. To the contrary, there are literally hundreds of pages of testimony and exhibits dealing with programs designed for plaintiff, including programs aimed at curbing his aggressive behavior, as well as programs dealing with feeding, showering, drying, dressing, attention, self-control and toilet training. *See, e.g.*, D. Ex. 10; R. 3-69-70; 5-44-56, 242-50; 6-162-66; 7-41-48. Programming continued to be provided even while plaintiff was in the hospital (R. 5-227, 248, 256; 6-50, 162; 7-32, 34, 41-48), and this programming resulted in a reduction of his aggressive behavior (R. 7-45).

3. Also misleading is plaintiff's assertion that defendants had taken the position in discovery that budgetary matters "are not even remotely related to this lawsuit" (Resp. Bf. 5, 38-39). This quotation is radically out of context. Plaintiff had attempted to compel production of *all* documents showing Pennhurst's sources and use of

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[8] Restraints were only used on a patient at Pennhurst when ordered by a physician (R. 5-221; 6-59, 67, 141; 7-39, 76). In this regard, plaintiff also suggests that the professional standard for judging the appropriateness of restraints is identical to that established by the lower court (Resp. Bf. 43-44). It is not. The lower court prohibited the use of restraints except where necessary to treat or protect the resident himself. Both professional standards and state and federal law permit the use of restraints to protect the resident *or others* (Resp. Bf. 43-44), thus allowing a balancing of both (1) the right of an individual resident to care and habilitation and the (2) right of the resident *and others* to be free from harm. The Court of Apeals did not, allowing only consideration of the individual resident's right to receive care and habilitation in the least restrictive manner, not the right of others to be protected from that resident.

funds since 1973 and *all* documents prepared for submission to Pennhurst's funding sources since 1973. Plaintiff's First Request for Production of Documents Nos. 14, 15, filed May 27, 1977. Defendant's objection was to the overbreadth of the request. The entire sentence on which plaintiff relies is as follows: "It is beyond reasonable dispute that the entirety of Pennhurst's financial and accounting records and filed [sic] are not even remotely related to this lawsuit." Defendants' Response to Plaintiff's Motion to Compel Production Documents, filed Aug. 24, 1977, at 11.[9]

4. Plaintiff also suggests, throughout his brief, that habilitation of the mentally retarded is a precise science, and that disputes over what is proper habilitation can be resolved readily by the federal courts. *See also* Brief of *Amici Curiae* American Orthopsychiatric Association, *et al.* The various *amici curiae* briefs filed in this case reflect the extent of the continuing dispute by professionals on this subject.[10] If experts in the field disagree over the value of different types of programming for the mentally retarded and the extent to which their functioning level can be improved, the courts are obviously poorly equipped to make such judgments. *See Parham v. J.R.*, 442 U.S. 584, 606-09 (1979).

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[9] In any event, budgetary and staffing considerations are proper concerns where institutionalized plaintiffs allege new constitutional rights. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

[10] A recent series of articles in *Mental Retardation* highlights the differences among experts in this field. *See* Cavalier and McCarver, *"Wyatt v. Stickney* and Mentally Retarded Individuals," 19 *Mental Retardation* 209 (1981); Menolascino and McGee, "The *New* Institutions," 19 *Mental Retardation* 215 (1981); Ellis, *et al*, "Common Sense in the Habilitation of Mentally Retarded Persons: A Reply to Menolascino and McGee," 19 *Mental Retardation* 221 (1981); Menolascino and McGee, "Rejoinder to the Partlow Committee," 19 *Mental Retardation* 227 (1981).

5. Finally, plaintiff erroneously contends that he has no adequate state remedies (Resp. Bf. 33). While the Pennsylvania Supreme Court has recognized a limited statutory immunity for public officials from liability for actions taken in releasing someone from a state institution,[11] *Freach v. Shovlin*, 471 Pa. 583, 370 A.2d 1163 (1977), no Pennsylvania court has ever held that that immunity applies to the type of negligence or malpractice claims being raised here. Instead, the doctrine of official immunity under Pennsylvania law is extremely limited, applying only where some important public policy requires it. *Dubree v. Commonwealth*, 481 Pa. 540, 393 A.2d 293 (1978). Thus, official immunity under Pennsylvania law is much more limited than even the federal standard. *See Procunier v. Navarette*, 434 U.S. 555 (1978); Pet. Bf. 34-37.

Similarly, the state's immunity from suit in state courts is much more limited than its Eleventh Amendment immunity in federal courts. *See Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978) (sovereign immunity abrogated). *See also Gibson v. Commonwealth*, 490 Pa. 156, 415 A.2d 80 (1980) (*Mayle* decision applied retroactively). Indeed, all acts of health care employees of Commonwealth institutions have been specifically exempted from any immunity. Pa. Stat. Ann. tit. 42 § 8522(b)(2) (reestablishes limited sovereign immunity). Thus, there is nothing "uncertain" or inadequate about the state law remedies available.[12]

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[11] *See* Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § 4603.

[12] Plaintiff's suggestion that, because the statute of limitations may have run by now, the remedy itself is inadequate (Resp. Bf. 33 n. 35) is simply absurd. Failure to pursue a remedy, whether out of neglect or a deliberate tactical decision, provides no basis for establishing a constitutional right.

II. PLAINTIFF'S EFFORT TO LIMIT OR IGNORE THE ISSUES BEFORE THIS COURT TOTALLY DISREGARDS THE DECISION OF THE *EN BANC* COURT OF APPEALS AND IS DIRECTLY CONTRARY TO THE POSITION HE TOOK IN THE LOWER COURTS.

Perhaps the most astounding thing about respondent's brief is his argument that the central constitutional issues decided by the Third Circuit are not presently before this Court. In so arguing, he ignores both the decision of the Court of Appeals and his own position below. For example, plaintiff states that:

> We do not discuss the circumstances, if any, under which the "least restrictive alternative" principle applies to habilitation of retarded persons. That issue is not presented in this case. Respondent's claims in this case are not premised on a right to "least restrictive" habilitation or treatment.

Resp. Bf. 10. *See also* Resp. Bf. 34, 41, 45-46. Plaintiff also would have this Court ignore the Third Circuit's holding that there is a constitutional right to habilitation, a holding basic to its decision in this case (Resp. Bf. 29).[18]

A quick review of the issues decided by the Third Circuit and the arguments raised by plaintiff below makes such an attempt nothing less than offensive. Plaintiff's strenuous efforts to avoid these issues in this Court is a clear indication of his view of the merits of the Third Circuit's decision on these points.

The simple answer to these incredible suggestions is that these issues were definitely decided by the *en banc* Court of Appeals. Moreover, unless reversed, the Third Circuit's ruling on these issues will be the law of this

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[18] Plaintiff's attempt to rely on state law to avoid the constitutional question, when he never pled or argued a state law right in any lower court, is discussed in Part III, *infra*.

case on remand,[14] as well as the final word in similar cases throughout the Third Circuit.

The Third Circuit held, *inter alia*, that the Due Process Clause of the Fourteenth Amendment provides the institutionalized mentally retarded with a right to treatment[15] which is acceptable in light of present medical or other scientific knowledge. 644 F.2d at 169, 173 (Pet. App. 38a, 47a).[16] Where restraints are used, the court held that defendants must show that it is "*the least restrictive method* of dealing with the patient." *Id.* at 161 (Pet. App. 18a) (emphasis added). Where "severe intrusions on individual dignity" or "significant deprivations of liberty" are involved,[17] "*the least intrusive treatment* available under the circumstances" must be provided, according to the lower court. *Id.* at 166, 173 (Pet. App. 30a-32a, 47a) (emphasis added).

The breadth of this holding is not surprising considering that plaintiff had expressly raised and pressed a constitutional right to treatment in the least restrictive

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[14] The court prescribed jury instructions for use on remand. 644 F.2d at 171 (Pet. App. 46a-47a).

[15] The court discussed the protection from harm and shackling claims separately. 644 F.2d at 159-64 (Pet. App. 14a-27a).

[16] While plaintiff discusses the holding below in terms of requiring "minimally adequate habilitation" (Resp. Bf. 45. n. 53), the decision cannot be so limited. By the Third Circuit's own definition of "habilitation", it encompasses " 'that education, training and care required by retarded individuals to reach their *maximum* development.' " *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84, 95 n. 14 (3d Cir. 1979) (emphasis added).

[17] While the court mentioned nonreversible physical operations or use of powerful antipsychotic drugs as examples of treatment involving "fundamental liberty violations," it did not even suggest that "significant deprivations" were limited to these areas. *Id.* at 166, 173 (Pet. App. 30a-32a, 47a). Rather, it left that decision for the jury. The court clearly would apply "least intrusive" analysis wherever a choice between treatment "aproaches" or "modes" is involved. *Id.*

alternative in the District Court, as well as in the Third Circuit. The following chronology is illustrative:

(1) In his Second Amended Complaint, plaintiff twice referred to a right to "treatment in the least restrictive alternative" (Pet. App. 91a).

(2) Plaintiff proposed jury instructions asserting that persons such as plaintiff have a right to "such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit," and "a constitutional right to treatment under the least restrictive conditions consistent with the purpose of the commitment" (Pet. App. 94a-95a).

(3) In the Third Circuit, a major section on plaintiff's brief was captioned: "THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT RESIDENTS OF A STATE MENTAL INSTITUTION HAVE A CONSTITUTIONAL RIGHT TO TREATMENT IN THE LEAST RESTRICTIVE ALTERNATIVE" (Brief for Appellants at 24).

Under these circumstances, there can be no doubt that the existence of rights to treatment and to the least restrictive alternative treatment are issues properly before this Court. Plaintiff's reliance on this Court's decisions in *Minnick v. California Department of Corrections*, 101 S. Ct. 2211 (1981), *Upjohn Co. v. United States*, 101 S. Ct. 677 (1981), and *Hodel v. Virginia Surface Mining Association*, 101 S. Ct. 2352 (1981) (Resp. Bf. 11, 46-47), is misplaced. There are neither significant ambiguities in the record, subsequent doctrinal developments nor the presentation of an abstract question of law.[18]

The Third Circuit has ruled on the claims presented to it by plaintiff and has laid down jury instructions for

[18] Under plaintiff's theory, this Court apparently would never review an order of a court of appeals involving a remand for a new trial because the theories and evidence might change. *But see Wood v. Strickland*, 420 U.S. 308 (1975).

the District Court's use on remand. Those issues are therefore properly before this Court for resolution.[19]

III. STATE LAW DOES NOT CREATE A SUBSTANTIVE DUE PROCESS RIGHT TO TREATMENT.

Plaintiff now relies heavily on an alleged state law statutory right to treatment as a basis for asserting a due process right to treatment (Resp. Bf. 15-16, 25-29). Because plaintiff never raised a state law claim below, this argument is not properly before the Court. Moreover, even if this contention were properly before the Court, it must be rejected because (1) a state statute cannot create a substantive due process right, and (2) in any event, the Mental Health and Mental Retardation Act of 1966 (MH/MR Act), Pa. Stat. Ann. tit. 50 § 4406, does not create a right to treatment.

The fundamental fallacy in plaintiff's argument on this point is his assertion that state statutes can create interests entitled to the substantive protection of the Due Process Clause. It is undisputed that a state statute can create a liberty interest which cannot be deprived without *procedural* due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Wolff v. McDonnell*, 418 U.S. 539 (1974). This proposition flows naturally from this Court's decisions recognizing that a state statute can create a property interest entitled to procedural protection

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[19] In any event, certainly plaintiff, having pressed these constitutional claims below, should not now be heard to say that they are not before this Court. While plaintiff can always concede that certain of his claims are meritless, and an inference can be drawn that this is what he is really saying with this argument, he cannot, in good faith, continue to urge that the Third Circuit's decision on this point be affirmed. Some courts have applied the doctrine of "judicial estoppel" to preclude such an attempt to "play fast and loose with the courts." *See, e.g., Scarano v. Central Railroad Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953); *Wade v. Woodings-Verona Tool Works, Inc.*, 469 F. Supp. 465, 467 (W.D. Pa. 1979).

under the Due Process Clause. *See, e.g., Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). However, whether there exists a liberty interest for procedural due process purposes is a very different question from whether a substantive due process interest is present. *See Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 n. 48 (1977).

The due process protections in *Wolff* and *Vitek*, the cases on which plaintiff relies, were procedural; due process did not guarantee McDonnell his good time credits, nor conclude that Jones was not mentally ill. Instead, due process required that hearings determine whether the facts warranted the loss of liberty or property. The manner of deprivation was at issue, not the fact of deprivation. In contrast, plaintiff here neither seeks a hearing nor concedes that were on provided, his "right" to treatment could be curtailed. Thus, the procedural due process cases on which plaintiff relies are inapposite.

Moreover, there are important reasons underlying this distinction. If every state statute which touches upon liberty interests in the procedural due process sense also created a substantive due process right, the substantive protection of the Due Process Clause would be radically expanded. Indeed, every violation of any state statute requiring government action would give rise to a federal claim under 42 U.S.C. § 1983 for violation of substantive due process. Such a result would also violate concepts of federalism. The division of functions between our state and federal governments has long been recognized by this Court. *See Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Under those principles, it is one thing to use federal law—procedural due process—to create a *state* judicial or administrative forum to hear state law issues. It is quite another to use federal law—substantive due process—to create a *federal* forum to hear those state law issues.

In any event, the MH/MR Act does not create a right to treatment (Pet. Bf. 17-18). Plaintiff's reliance on *In Re Joseph Schmidt*, 429 A.2d 631 (Pa. 1981), as support for a contrary result, is misplaced. Despite dicta on certain state law rights, the holding there was limited to which government entity—the state or the county—had responsibility for finding a long-term institutional placement for Joseph Schmidt. *See also In Re Guzan*, 45 Pa. Commonwealth Ct. 525, 405 A.2d 1036 (1979).

Thus, the MH/MR Act does not establish a right to treatment, let alone provide the basis for such a right as a matter of substantive due process.

IV. THE ISSUE OF GOOD FAITH IMMUNITY HAS BEEN PRESERVED FOR APPEAL.

Plaintiff's suggestion that the issue of good faith immunity has not been preserved for appeal (Resp. Bf. 51 n. 62) is meritless. In the District Court, defendants requested an instruction on good faith immunity (J.A. 41a-42a) and the judge instructed the jury on this issue (J.A. 76a). In the Third Circuit, they again argued the issue in their brief (Brief of Appellees at 33-40). In any event, no court has ever held that an appellee has the burden of raising the issue of good faith immunity by a cross-appeal where the jury found in his favor. Simply stated, a fully successful party has no obligation and, indeed, no ability to appeal.

Thus, the issue of good faith immunity is properly before this Court and provides an independent basis for reinstating the judgment of the District Court.[20]

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[20] In plaintiff's argument on good faith, he also incorrectly states that "[t]he Pennsylvania Attorney General's representation of petitioners means that they will in fact be indemnified against any judgment in this case" (Resp. Bf. 55 n. 66). To the contrary, under 4 Pa. Code §§ 39.2-39.3, indemnification is discretionary, not mandatory, even where the Attorney General provides representation.

CONCLUSION

The decision of the Third Circuit Court of Appeals should be vacated with directions to affirm the judgment of the District Court.

Respectfully submitted,

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FILED
SEP 23 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, *et al.*,
Petitioners,
v.
NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, MENTAL HEALTH ASSOCIATION AND NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1429

DUANE YOUNGBERG, *et al.*,
Petitioners,

v.

NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, MENTAL HEALTH ASSOCIATION AND NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations of mental retardation and mental health professionals and citizens who are concerned with the legal rights of mentally retarded people [1]

[1] *Amici* include:

(1) The Association for Retarded Citizens of the United States, a voluntary organization devoted to promoting the welfare of mentally retarded people with approximately 300,000 members;

(2) The American Orthopsychiatric Association, an interdisciplinary organization of 8,000 members, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of abnormal behavior;

[Footnote continued on page 2]

to receive appropriate care and habilitation in institutions.[2] *Amici* have in common a strong commitment to the provision of educational, psychological, medical and social services which will afford mentally retarded persons safe and decent living conditions and an opportunity to function as fully and normally as their capacity permits.

Many members of the *amici* organizations practice in residential facilities to which mentally retarded people are committed. These professionals are primarily responsible for assessing the needs of residents, designing treatment or habilitation plans to meet these needs and providing the appropriate clinical and other services necessary to carry out such individual plans.

As experienced professionals and concerned citizens, *amici* wish to provide the Court with information concerning the nature of mental retardation and its amelioration and to support the positions both of the respondent and of the Third Circuit Court of Appeals in its decision below.

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[1] [Continued]

(3) The American Psychological Association, a professional and scientific association with a membership of approximately 50,000 psychologists, many of whom practice in public institutions;

(4) The Mental Health Association, a citizens' organization of one million lay and professional members whose primary purpose is to encourage efforts to prevent mental illness, promote mental health and provide better services for the mentally disabled;

(5) The National Association of Social Workers, the world's largest organization of professional social workers with 85,000 members in chapters throughout all 50 states, devoted to advancement of sound public policy and promotion of high standards of social service practice and care.

[2] In this brief, the education, training and care used to improve the intellectual functioning and adaptive behavior of mentally retarded people are called "habilitation" rather than "treatment". "Treatment" refers to therapeutic or curative procedures administered to persons under a medical model. Because mental retardation cannot be eliminated or cured through treatment, its amelioration through education and training is called "habilitation".

The parties to this suit have consented to the filing of this brief. Their letters are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case requires the Court to determine the rights and interests of a mentally retarded person who has been involuntarily confined in an institution not because he has been convicted of a crime or because he is dangerous, but because he was found mentally disabled and in need of care and habilitation. *Amici* join respondent in asserting that such people have a constitutionally protected right to appropriate habilitation, a right to adequate protection from harm, including self-abuse and assault by other residents, and a right not to be shackled or restrained without justification.

Respondent has a constitutional right to habilitation as well as care because the state may not arbitrarily withhold his statutorily created interest in the receipt of habilitation and because the promise and provision of habilitation are necessary to the constitutionality of his civil commitment. Basic to both propositions is the fact that although, like other mentally retarded people, respondent has limited intellectual function and has not acquired certain behaviors, he can be taught more appropriate behavior and self-help skills through proper education and training. Under Pennsylvania law, the express purpose of civil commitment is to provide mentally disabled people with both care *and* habilitation. To argue that after commitment the state need provide only care is to ignore the plain language of the Pennsylvania commitment statute. Having thus granted respondent a right to receive habilitation while confined, due process requires that Pennsylvania not arbitrarily deny him habilitation. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Furthermore, the state's failure to provide habilitation which is acceptable in light of current professional knowledge undermines the constitutional basis for respondent's civil commitment itself. The massive deprivation of lib-

erty resulting from civil commitment can be justified only by an overriding state interest in confining the individual. The interests historically asserted are the state's interest in protecting society from dangerous individuals and in promoting the interests of persons unable to care for themselves. Since in this case there has been no finding that respondent is dangerous, the state's interest is that of promoting the individual's interests.

This purpose cannot be accomplished without the provision of habilitation as well as care for several reasons. First, unless they are provided with the stimulation and instruction of appropriate habilitation programs, institutionalized mentally retarded people lose skills with which they came to the institution. Second, without habilitation, mentally retarded people living in institutions often become aggressive and self-abusive. Finally, in the absence of habilitation, the commitment of a mentally retarded person is a life sentence with almost no possibility of release. But with habilitation, institutionalized mentally retarded people become more self-sufficient, thereby increasing their liberty and autonomy within the institution and the possibility of their return to life in the community. Therefore, conditions of confinement which do not include the provision of habilitation bear no reasonable relation to the permissible purposes of confinement and are violative of the Constitution's due process requirements. *Jackson v. Indiana*, 406 U.S. 715 (1972).

Even if habilitation were not a constitutionally necessary purpose for civil commitment of mentally retarded people, it must be provided once the state has taken a mentally retarded person into custody. Regardless of the reasons for confinement and their constitutionality (which are not challenged in this case), when the state has assumed custody of a noncriminal mentally retarded person, it has a constitutional obligation to protect him from harm. The eighth amendment protects prisoners from cruel and unusual punishment, including serious deprivation of basic human needs. *Rhodes v. Chapman*, 49 U.S.L.W. 4677 (U.S. June 15, 1981) (No. 80-332). Due

process protects noncriminal inmates of mental retardation facilities from no less. And most basic to mentally retarded people is their need for improved intellectual and social functioning, which can be met through appropriate education and training. Without such habilitation, they will regress. In addition, the state's obligation to protect mentally retarded people in state custody from harm includes its obligation to protect them against self-abuse and attacks from other residents. This obligation, too, can be met through appropriate habilitation programs.

Finally, even without a right to protection from harm, noncriminal persons confined by the state have a right under the due process clause to be free from punishment. *Bell v. Wolfish*, 441 U.S. 520 (1979). This right is violated where, without justification, the state imposes harsh conditions, such as shackling or an unsafe environment, to accomplish purposes that could be achieved through less harsh means.

Amici also support this Court's decision in *Wood v. Strickland*, 420 U.S. 308 (1975), establishing qualified immunity to state officials working in public facilities.

ARGUMENT

I. MENTAL RETARDATION IS NOT A MENTAL ILLNESS BUT A FUNCTIONAL DISORDER SUSCEPTIBLE TO IMPROVEMENT THROUGH TRAINING AND EDUCATION.

A. Mental Retardation Involves Slow or Limited Intellectual Functioning, Accompanied by Deficits in Adaptive Behavior.

Mental retardation is a term which refers to a wide number of conditions resulting in subaverage intellectual functioning accompanied by deficits in adaptive behavior.[3] A diagnosis of mental retardation is made on several criteria, including measured intelligence (IQ tests), adap-

[3] *See* H. GROSSMAN, MANUAL OF TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION (1973).

tive behavior level and medical classification.[4] Fundamentally, the characteristic which distinguishes mentally retarded people is their failure to learn things that their intellectually normal peers have learned.[5] They are unable to recognize cues and stimuli from their environment as appropriate guides to behavior.[6]

In this country, people are not considered retarded unless they score in the lowest two percent of the population on standardized intelligence tests.[7] It is estimated that about three percent of the population of the United States—about 6 million people—will at some time in their life function in the mentally retarded range.[8]

More than 250 causes of mental retardation have been identified to date. Mental retardation may follow or be associated with infection and intoxication, trauma or physical agents, disorders of metabolism or nutrition, gross post-natal brain disease, chromosomal abnormali-

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[4] Roos, *Basic Facts About Mental Retardation*, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 127, 131 (P. Friedman ed. 1979).

[5] Bigelow, *The Behavioral Approach to Retardation*, in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED 17 (T. Thompson & J. Grabowski eds. 1972).

[6] H. LELAND & D. SMITH, MENTAL RETARDATION: PRESENT AND FUTURE PERSPECTIVES 6 (1974).

[7] Grossman, *supra* note 3.

[8] Tarjan, *et al., Natural History of Mental Retardation: Some Aspects of Epidemiology*, 77 AM. J. MENTAL DEFICIENCY 369-79 (1973). Probably no more than 1% of the population, or 2 million Americans, are technically mentally retarded at any given time. *Id.* A 1976 review of epidemiological studies revealed that estimates of the rate of mental retardation varied from less than 1% to almost 20%, depending primarily on methodological, sampling and definitional differences among the studies. Conley, *Mental Retardation—An Economist's Approach*, 14 MENTAL RETARDATION ser. 6, at 20-24 (1976). The peak period of identification is between the ages of 6 and 12, and about two-thirds of the individuals diagnosed as mentally retarded lose their labeling during late adolescence or early adulthood.

ties, premature birth or environmental influences.[9] As would be expected, "mental retardation" describes people with a wide variety of characteristics and abilities.[10] The vast majority are capable of living and do live outside of institutions. Fewer than 200,000 of the nation's mentally retarded citizens are residents of public institutions for the retarded.[11] Most are admitted to institutions as teenagers; many stay for decades.[12]

Historically, mentally retarded people have been variously viewed as subhuman beings, deserving to be treated much like animals, as menaces requiring prison-like confinement for the protection of society, as eternal children needing to be overprotected and humored and as hopelessly "sick" patients needing hospitalization and medical services.[13] These conceptions all supported the development of segregated custodial institutions for the retarded in the early decades of this century.[14]

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[9] P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS (1976), *citing* Hughes, *Definition, Diagnosis, Classification and Associated Problems in Mental Retardation*, 1 L. & PSYCH. REV. 17, 20-21 (1975).

[10] The American Association on Mental Deficiency recognizes four levels of retardation: "mildly retarded," generally regarded as capable of economic self-sufficiency; "moderately retarded," regarded as capable of productive employment in sheltered-worshop arrangements; "severely retarded"; and "profoundly retarded." Roos, *supra* note 4, at 131-32.

[11] COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE 9 (1977).

[12] *See* Butterfield, *Some Basic Changes in Residential Facilities*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 15, 22-23 (R. Kugel & A. Shearer eds. 1976) [hereinafter cited as "CHANGING PATTERNS"].

[13] Roos, *supra* note 4, at 130.

[14] F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION 46-48 (1977); Wolfensberger, *The Origin and Nature of Our Institutional Models*, in CHANGING PATTERNS 35.

However, World War II brought new awareness of the prevalence of mental retardation and new compassion for physically and mentally handicapped people.[15] At the same time, studies revealed the debilitating effects of rigidly ordered institutional life. It was discovered that prolonged stays in institutions reduced cognitive and social ability.[16] In the 1960s mental retardation was increasingly recognized for what it is: a problem with learning. This awareness supported the need to improve the learning processes of mentally retarded people—to educate and train them to better cope and function in their environment.

> [T]he overall thrust of modern habilitation is the remediation of the delayed learning process so as to develop the maximum growth potential by the acquisition of self-help, language, personal, social, educational, vocational, and recreational skills.[17]

This concept underlies the Developmental Disabilities Assistance and Bill of Rights Act,[18] the Education for All Handicapped Children Act[19] and the standards for retardation facilities promulgated under the Medicaid program,[20] as well as judicial decisions finding a right to education for mentally retarded people.[21]

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[15] E. GINZBERG & D. BRAY, THE UNEDUCATED 41-42 (1953).

[16] Begab, *The Mentally Retarded and Society: Trends and Issues*, in THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE 3, 19 (M. Begab & S. Richardson eds. 1975).

[17] Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Interface*, 10 CREIGHTON L. REV. 124, 139-40 (1976).

[18] 42 U.S.C. §§ 6000-6081 (1976). *See* 42 U.S.C. § 6010(2) (1976).

[19] 20 U.S.C. §§ 1401-1461 (1976). *See* 20 U.S.C. §§ 1412 (1) & (2)(C) (1976).

[20] 42 U.S.C. § 1396d(d); 42 C.F.R. §§ 442.434 & .435.

[21] *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Association for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971).

B. Although They Learn Slowly, Mentally Retarded People Can Learn.

Since the 1960s, retardation professionals have developed new methods for assessing capabilities of even the most seriously disabled individuals.[22] The result has been a dramatic reassessment of the learning potential of severely and profoundly retarded individuals. There is now extensive documentation of the improvement which can be achieved by severely and profoundly retarded persons in self-help skills, reduction of undesirable behaviors, language skills, social skills and vocational skills as a result of appropriate instructional techniques.[23]

Some experts believe that the acquisition of skills by mentally retarded people may be a function more of the kind of instructional programming, environment and intellectual stimulation provided to them than of their limited mental ability.[24] As a group, mentally retarded people by definition suffer from a deficit in intellectual ability, and the great weight of professional opinion is

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[22] Berkson & Landesman-Dwyer, *Behavior Research in Severe and Profound Mental Retardation (1955-1974)*, 81 AM. J. MENTAL DEFICIENCY 428 (1977).

[23] *See, e.g.*, Osarchuk, *Operant Methods of Toilet Training of Severely and Profoundly Retarded: A Review*, 7 J. SPEC. ED. 423 (1973) (proper toileting); Murphy, Nunes & Hutchings-Ruprecht, *Reduction of Stereotyped Behavior in Profoundly Retarded Individuals*, 82 AM. J. MENTAL DEFICIENCY 238 (1977) (reducing stereotyped behaviors); Booth, *Early Receptive Language Training for the Severely and Profoundly Retarded*, 9 LANGUAGE, SPEECH AND HEARING SERVICES IN SCHOOLS 151 (1978) (general language skills); Bellamy, Peterson & Close, *Habilitation of the Severely and Profoundly Retarded: Illustrations of Competence*, 10 ED. AND TRAINING OF MENTALLY RETARDED 174 (1975) (general vocational tasks). *See also* Bronston, *Matters of Design*, in ACHIEVEMENTS IN RESIDENTIAL SERVICES FOR PERSONS WITH DISABILITIES: TOWARD EXCELLENCE 7 (T. Apollini, J. Cappuccilli & T. Cooke eds. 1980); *Welsch v. Likins*, 373 F. Supp. 487, 495 (D. Minn. 1974), *modified*, 550 F.2d 1122 (8th Cir. 1977).

[24] Sontag, Dodd & Button, *The Education and Community Support of Severely Handicapped People*, 6 INT'L J. MENTAL HEALTH 35, 36 (1977); Bronston, *supra* note 23; Berkson, *supra* note 22.

to the effect that the functional level of most severely and profoundly retarded people can be improved through proper education.[25]

C. Without Instructional Programs, Institutionalized Mentally Retarded People Lose Skills and Often Become Aggressive and Self-Abusive.

Mental retardation professionals long ago discovered that when mentally retarded people live for extended periods of time in impersonal, routinized surroundings with neither individual attention nor freedom to make decisions, they regress and lose abilities they had when they came to the institution. Professional literature sets forth extensive evidence that residents of institutions suffer decreases in such significant areas as intelligence quotient, motor skills, social competence and verbal skills.[26] This decrease in functional level is the result of lack of stimulation and practice in using already-acquired skills.[27] It is ironic that persons who are confined to an

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[25] *See* note 23, *supra*.

[26] *See* Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153 (1978); Vogel, *Effects of Environmental Enrichment and Environmental Deprivation on Cognitive Functioning in Institutionalized Retardates*, 31 J. CONSULTING PSYCH. 570 (1967); Guthrie, Butler & Gorlow, *Personality Differences Between Institutionalized and Non-institutionalized Retardates*, 67 AM. J. MENTAL DEFICIENCY 543 (1963); Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 AM. J. MENTAL DEFICIENCY 666 (1970); Schlanger, *Environmental Influences on the Verbal Output of Mentally Retarded Children*, 19 J. SPEECH & HEARING DISORDERS 339 (1954); Lyle, *The Effect of an Institutional Environment Upon the Verbal Development of Imbecile Children—Part II*, 4 J. MENTAL DEFICIENCY RESEARCH 1 (1960).

[27] A federal district court expressly found such regression among Pennhurst residents. *Halderman v. Pennhurst State School & Hospital*, 466 F. Supp. 1295, 1322 (E.D. Pa. 1978), *modified*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *rev'd on other grounds*, 49 U.S.L.W. 4363 (U.S. April 20, 1981) (Nos. 79-1404, -1408, -1414, -1415, -1489).

institution because they are thought helpless to improve their ability to function in fact learn helplessness there.[28]

In addition to becoming functionally incapacitated, residents of institutions that lack stimulation and training become hostile and aggressive in their boredom. Perhaps in frustration, perhaps to gain staff attention, perhaps in a confused effort to create the stimulation lacking in their environment, institutionalized mentally disabled people often become self-abusive and assaultive.[29] Biting and head-banging are common institutional problems. Yet studies have shown that such behavior decreases dramatically when programs are introduced teaching residents to dress, feed and clothe themselves, to write and draw, to play games and to speak.[30] There is nothing revolutionary about the conclusion that instructional programs help to prevent or stop aggressive behavior. Common sense and experience indicate that when time is taken up with constructive activities residents have less time and inclination to engage in destructive behavior.

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[28] The term "learned helplessness" has been used to describe the process by which institutional residents become functionally incapacitated as a result of their prolonged confinement. DeVellis, *Learned Helplessness in Institutions*, 15 MENTAL RETARDATION 10, ser. 5 (1977). *See also* N. HOBBS, THE FUTURES OF CHILDREN 124-55 (1975); Stimson, *et al.*, *Effects of Early Institutionalization on Growth and Development of Young Children With Down's Syndrome*, 67 MICH. MED. 1213 (Oct. 1968); Lyle, *supra* note 26.

[29] Bigelow and Griffiths, *An Intensive Teaching Unit For Severely and Profoundly Retarded Women*, in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED 99 (T. Thompson & J. Grabowski eds. 1972); Grabowski & Thompson, A *Behavior Modification Program for Behaviorally Retarded Institutionalized Males*, in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED 77, 91-94 (T. Thompson & Grabowski eds. 1972); Guthrie, Butler and Gorlow, *supra* note 26.

[30] *See, e.g.*, Foxx & Azrin, *Restitution: A Method of Eliminating Aggressive-Disruptive Behavior of Retarded and Brain Damaged Patients*, 10 BEHAVIOR RESEARCH & THERAPY 15 (1972); *see* note 29, *supra*.

D. With Instructional Programs, Many If Not All Institutionalized Mentally Retarded People Can Return to the Community.

The view is unfounded that mentally retarded people are nonfunctioning and medically dependent individuals who cannot survive without a protective institutional environment. We know that such persons can learn useful behaviors and, further, we know that, having learned minimal self-help and social skills, they can live successfully in the community. Studies of large numbers of severely and profoundly retarded people placed in noninstitutional residential facilities reveal that successful placement depends not primarily on their IQs but principally on the quality and kind of supporting services provided: social work services, homemaker services, recreation, etc.[21] Even institutional residents who have medical needs and limited mobility can be placed in community settings when special supports are provided.[22]

In sum, we know that adaptive behaviors can be learned which will better equip mentally retarded people to live in the community. The vast majority of institutionalized mentally retarded people can be restored to the freedom of contemporary community living with proper instruction and education.

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[21] McCarver & Craig, *Placement of the Retarded in the Community: Prognosis and Outcome*, 7 INT'L REVIEW OF RESEARCH IN MENTAL RETARDATION 145, 168-78 (1974); Heal, Sigelman & Switsky, *Research on Community Residential Alternatives for the Mentally Retarded*, 9 INT'L REVIEW OF RESEARCH IN MENTAL RETARDATION 209 (1978); *see also* Bell, *IQ as a Factor in Community Life Style of Previously Institutionalized Retardates*, 14 MENTAL RETARDATION ser. 3, at 29 (1976).

[22] Provencal, *The Macomb-Oakland Regional Center*, in ACHIEVEMENTS IN RESIDENTIAL SERVICES FOR PERSONS WITH DISABILITIES: TOWARD EXCELLENCE 19, 25 (T. Apolloni, J. Cappuccilli & T. Cooke eds. 1980).

II. A NONCRIMINAL MENTALLY RETARDED PERSON CONFINED IN A PENNSYLVANIA FACILITY HAS A STATE STATUTORY RIGHT TO CARE AND HABILITATION, WHICH IS PROTECTED AGAINST ARBITRARY ABROGATION BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

Respondent Nicholas Romeo was confined pursuant to § 4406 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, which expressly provides that:

> If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may *order the commitment* of such person *for care and treatment.*

Pa. Stat. Ann. tit. 50, § 4406(b) (emphasis added).

All parties agree that Pennsylvania state law gives mentally retarded people in state residential facilities a right to humane care. Brief for Petitioners at 14-19 [hereinafter cited as "Pet. Br."]. However, the petitioners in this case contend that Pennsylvania state law mandates only care and not treatment. *Id.* *Amici* disagree with petitioners and believe Pennsylvania's law explicitly gives a right to both care and, in the language of the statute, treatment. In support of their contention, petitioners cite an inapplicable section of the Pennsylvania statute, § 4406(a), which applies only to the period during which prospective committees are being examined. They ignore the language of § 4406(b), which clearly establishes the purposes for which a court may order commitment of such persons. Indeed, two Pennsylvania federal district courts followed the plain language and clear legislative history of the statute in ruling that § 4406(b) requires the provision of treatment. *Eubanks v. Clarke*, 434 F. Supp. 1022, 1026-27 (E.D. Pa. 1977); *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1322 (E.D. Pa. 1978), *modified*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *rev'd on other grounds*,

49 U.S.L.W. 4363 (U.S. April 20, 1981) (Nos. 79-1404, -1408, -1414, -1415, -1489).

Such a clear state-given right creates a constitutionally protected liberty interest. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).[23] For example, in *Wolff* a state statute created a system of good-time credits whereby prisoners could shorten the length of their confinement and be restored to liberty. This Court held that having created such a system, the state must respect procedural due process requirements in the granting and withholding of such credits. Again, in *Vitek*, a state statute gave prisoners a liberty interest in not being subjected to the stigma attached to hospitalization in a mental institution and not being subjected to mandatory psychiatric treatment except upon certain findings of fact. This Court held that the due process clause of the federal Constitution requires that procedural due process be followed before that state-created interest could be infringed. Analogous to good-time credits, Pennsylvania's statutory promise of care and treatment creates an interest in the restoration of liberty, for only with care and treatment (*i.e.*, habilitation) do Nicholas Romeo and other institutionalized mentally retarded people have any realistic chance of returning to life in the community or of gaining more autonomy within the institution. *See* subsections I, B, and I, D, *supra*.

This liberty interest in the receipt of habilitation is protected against arbitrary infringement by the state. As stated in *Wolff*, "[t]he touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff v. McDonnell*, 418 U.S. at 558. Clearly nothing is more arbitrary than depriving someone of his liberty for the purpose of care and then confining

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[23] Even if the state-created interest in the receipt of care and treatment is regarded as a property interest in receiving an affirmative benefit from the state rather than a means of returning to freedom, it is protected by due process. *Wolff v. McDonnell*, 418 U.S. at 557-58.

him in highly dangerous and frightening conditions where he suffers great harm. Similarly, it is arbitrary to deprive a person of his liberty for the purpose of habilitation and then deny him available habilitation programs. Romeo indisputably received 77 injuries while at Pennhurst, resulting from attacks by other residents as well as self-abuse, and allegedly was denied habilitation for months at a time, although petitioners concede that adequate staff and appropriate programs were available. Tr. 5-173, 6-21, 6-135-36.

III. EVEN WITHOUT AN EXPRESS STATUTORY GUARANTEE, A NONCRIMINAL MENTALLY RETARDED PERSON IN A STATE FACILITY HAS A RIGHT TO CARE AND HABILITATION DIRECTLY UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

A. Care and Habilitation Are Each Constitutionally Necessary Purposes for Commitment of Mentally Retarded People and, Where the State Has Exercised Its Commitment Power, Due Process Requires That It Provide Both Care and Habilitation.

1. *Respondent's Involuntary Civil Commitment Abridges His Constitutionally Protected Liberty.*

In addition to abridging the most basic aspect of constitutional liberty—the right to be free from physical confinement—involuntary commitment severely limits the exercise of other constitutional rights such as the right to privacy and personal autonomy, *Roe v. Wade*, 410 U.S. 113 (1973); the right to association, *Shelton v. Tucker*, 364 U.S. 479 (1960); the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the "right to work for a living in the common occupations of the community," *Truax v. Raich*, 239 U.S. 33 (1915); and the right to movement, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

As this Court has recently commented: "Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Such massive

interference with personal liberties can be reconciled with the due process clause only if it can be justified in terms of an overriding governmental interest. *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The petitioners are mistaken in their assertion that the liberty interest at stake at the time of civil commitment is not a fundamental interest. Pet. Br. at 16. The interest in being left alone to live freely in society has long been recognized as the essence of constitutionally protected liberty. *Boyd v. United States*, 116 U.S. 616 (1886), cited with approval in *Griswold v. Connecticut*, 381 U.S. 479 (1965).[34] Only after that most basic liberty has been constitutionally diminished by criminal conviction, pretrial detention or civil commitment can certain remaining interests be abridged upon a showing of a rational relation to a legitimate state purpose. *Bell v. Wolfish*, 441 U.S. 520 (1979). Thus, although conditions of confinement must bear only a reasonable relationship to the purposes of confinement, civil commitment itself must be justified by a compelling state interest.

2. *Care and habilitation are each necessary but not sufficient purposes for the constitutional confinement of noncriminal mentally retarded people.*

As is demonstrated below, for mentally retarded individuals who have not been found to have committed a criminal offense, the massive deprivation of liberty which results from commitment can be justified only by the provision of both adequate care and habilitation.

Amici do not agree with petitioners that the state could constitutionally commit mentally retarded people

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[34] Describing the liberty protected by the fourth and fifth amendments to the Constitution, this court recognized in *Boyd v. United States* that it consisted "of the sanctity of a man's home and the privacies of life . . . his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense. . . ." 116 U.S. at 630.

solely for the purpose of providing them care and that therefore it has an obligation to provide only care. Pet. Br. at 14-19. Neither do *amici* believe that habilitation alone is a constitutionally sufficient purpose for civil commitment of mentally retarded people and that the provision of habilitation alone would justify confinement.[35] In *amici*'s view, the state can constitutionally confine mentally retarded people under its *parens patriae* power only for both the purposes of care *and* habilitation.[36] Once having committed someone for these purposes, the state must provide both care *and* habilitation.

Although the Supreme Court has never directly decided whether institutionalized mentally ill persons have a constitutional right to treatment, the Court has not hesitated to acknowledge that custodial confinement *without treatment* raises "substantial constitutional" questions, even in cases in which confinement can be justified, at least in part, under the police power. *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1972). *See also In re Gault*, 387 U.S. 1, 22 n.30 (1967).

To permit the commitment of mentally retarded people to an institution for the purpose of care alone, without habilitation, is to permit the state to commit such

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[35] In *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975), this Court expressly declined to decide this issue.

[36] The *parens patriae* power is "inherent in the supreme power of every state," *Mormon Church v. United States*, 136 U.S. 1, 57 (1890), and is the power exercised when the state acts as guardian of citizens with disabilities. *Hawaii v. Standard Oil of California*, 405 U.S. 251, 257 (1972). It serves as the basis for state laws which protect minors, establish guardianships and provide for involuntary commitment of the mentally disabled. *See generally* Comment, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) [hereinafter cited as "Developments—Civil Commitment"]. Some argue that alternatively, the state may exercise its police power to protect the public from dangerous mentally disabled people. Whether prevention of dangerous conduct is also a constitutionally necessary and/or sufficient ground for civil commitment is not at issue in this case, which does not challenge the constitutionality of respondent's commitment.

people to a life sentence, for their ability to care for themselves will be enhanced only through improved functioning. Left neglected in an institution without appropriate habilitation programs, mentally retarded people have no prospect of attaining a functional level that will permit their return to the community, either with the assistance of family and friends or with the assistance of state-supported services.

As the Fifth Circuit Court of Appeals observed in *Wyatt v. Aderholt*, 503 F.2d 1305, 1313 (5th Cir. 1974), the massive deprivation of liberty involved in commitment to a mental retardation facility cannot be outweighed by the state's interest in providing care alone, even to those who need care. The state must provide habilitation which gives a reasonable prospect for an improvement in functioning and an increase in individual freedom either within the institution or outside, depending upon the progress of the individual resident.[37] Whether there may be a few mentally retarded people so disabled that they cannot return to the community or improve in any way relevant to their exercise of liberty is not germane, for it has been demonstrated that, generally, institutionalized mentally retarded people can benefit from habilitation and that it is impossible to

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[37] In *Robinson v. California*, 370 U.S. 660 (1962), as well as in subsequent cases, the Supreme Court has made clear that no one may constitutionally be *punished* for the mere "status" of being mentally different, and that confinement of noncriminals, in prison-like institutions, without "treatment" would be an impermissible purpose, violative of the eighth and fourteenth amendments. *Robinson* was concerned with confinement in a "prison." But constitutional rights depend on functional realities, not on the "civil" or "criminal" label which attaches to an institution or procedure. *Specht v. Patterson*, 386 U.S. 605 (1960); *In re Gault*, 387 U.S. 1 (1967). Individuals' rights cannot be abridged merely by "the hanging of a new sign—reading 'hospital'—over one wing of a jailhouse." *Powell v. Texas*, 392 U.S. 514, 529 (1968).

See also Martarella v. Kelly, 349 F. Supp. 575, 599 (S.D.N.Y. 1972), *Welsch v. Likins*, 373 F. Supp. 487, 496 (D. Minn. 1974), *modified*, 550 F.2d 1122 (8th Cir. 1977); *United States v. Jackson*, 306 F. Supp. 4, 6 (N.D. Cal. 1969).

identify ahead of time the few who may not. *See generally* Section I, *supra.*

Furthermore, the state has not chosen to commit all persons who cannot care for themselves, but only those who are in need of "care or treatment" "by reason of [their] mental disabilities." Pa. Stat. Ann. tit. 50, § 4406(a) and (b). These include mentally retarded people who, as discussed above, by definition have deficits in intellectual and social functioning amenable to improvement through habilitation. Unless we are to believe that the state has arbitrarily selected this group for involuntary confinement, we must assume that there is a rational relationship between their mental condition and the purpose of their confinement. That purpose can only be the treatment of their mental disability with the goal of improving their ability to care for themselves.

To hold otherwise would mean that the state could constitutionally commit a person who had need for both care (safety, food, shelter, clothing, etc.) and habilitation (services to enhance intellectual and social functioning) and then could meet his physical health-care needs while ignoring his mental health-care needs. Surely the Constitution makes no such arbitrary distinctions. Consider the situation of a mentally retarded person who, as a result of physical injury, will lose his speech unless a known and available medical procedure is provided; due process requires the state to render needed medical attention. *Estelle v. Gamble*, 429 U.S. 97 (1976). The Constitution does not require less where a mentally retarded person may lose his power of speech as a result of a lack of stimulation and appropriate habilitation.

3. *Due process requires that the nature of involuntary confinement be reasonably related to the purposes of that confinement; respondent thus has a constitutional right to both care and habilitation.*

As noted above, "due process requires that the nature and duration of *commitment bear some reasonable rela-*

tion to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972) (emphasis added). As demonstrated, care and habilitation are each necessary but not, alone, sufficient purposes for commitment of noncriminal mentally retarded persons; both must be delivered to meet the *Jackson* test. As a district court has observed:

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then to fail to provide adequate treatment violates the very fundamentals of due process.

Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1972), *modified sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

Accepting this reasoning, implicitly when not explicitly, the overwhelming majority of courts[38] and legal schol-

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[38] The constitutional right to treatment for mentally ill and mentally retarded people has been recognized by both federal and state courts. *See, e.g., Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), *petition for cert. filed*, 49 U.S.L.W. 3790 (U.S. April 10, 1981) (No. 80-1099); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976), *aff'd*, 601 F.2d 240 (5th Cir. 1979); *New York State* Association for *Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), *aff'd* 596 F.2d 27 (2d Cir. 1979); *Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978); *Wyatt v. Stickney*, 325 F. Supp. 781; *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Flakes v. Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981); *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980); *Johnson v. Solomon*, 484 F. Supp. 278 (D.Md. 1979); *Eckerhart v. Hensley*, 475 F. Supp. 908 (W.D. Mo. 1979); *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979); *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Steubig v. Hammel*, 446 F. Supp. 31 (M.D. Pa. 1977); *Eubanks v. Clarke*, 434 F. Supp. 102 (E.D. Pa. 1977).

There is also a widening body of precedent holding that there is a constitutional right to treatment for other people committed under "non-penal" statutes for the purpose of care and treatment: (a) juvenile delinquents, *Nelson v. Heyne*, 355 F. Supp. 451, 459 (N.D. Ind. 1973), *aff'd*, 491 F.2d 352, 358 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1976); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1364 (D.R.I. 1972); (b) "persons in need of

ars [39] that have addressed the issue have recognized a constitutional right to care and treatment for noncriminal mentally ill and mentally retarded persons confined in institutions. *Amici* urge this Court to give its imprimatur to those holdings.

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supervision," *Martarella v. Kelley*, 349 F. Supp. 575, 585, 598-600 (S.D.N.Y. 1972); *M v. M*, 71 Misc. 2d 396, 336 N.Y.S.2d 304 (Fam. Ct. 1970); (c) sexual offenders and defective delinquents, *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397, *cert. denied*, 385 U.S. 940 (1966); *Commonwealth v. Page*, 339 Mass. 313, 159 N.E.2d 82 (1959); *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958); *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973); *Davy v. Sullivan*, 354 F. Supp. 1320, 1329-30 (M.D. Ala. 1973); *Silvers v. People*, 22 Mich. App. 1, 176 N.W.2d 702 (1970); and (d) persons incompetent to stand trial, *United States v. Walker*, 335 F. Supp. 705, 708 (N.D. Cal. 1971); *Nason v. Superintendent of Bridgewater State Hospital*, 353 Mass. 604, 612-13, 233 N.E.2d 908, 913-14 (1968).

[39] The constitutional right to treatment or release for involuntarily committed mental patients has received an unusual amount of scholarly discussion and support. The first articulation of the right is found in Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960). In the last 20 years many law review articles have been published on the subject, almost all of them supporting a constitutional right to treatment or release for the involuntarily confined. *See, e.g., Developments—Civil Commitment, supra* note 36; Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. J.L. & SOC. PROB. 193 (1980); Dowben, *Legal Rights of the Mentally Impaired*, 16 HOUS. L. REV. 833 (1979); Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049 (1979); Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded*, 32 SW. L.J. 605 (1978); Grant, *Donaldson, Dangerousness, and the Right to Treatment*, 3 HASTINGS L.Q. 599 (1976); Comment, *The Eighth Amendment Right to Treatment for Involuntarily Committed Mental Patients*, 61 IOWA L. REV. 1057 (1976); Note, *Rights of the Mentally Ill During Incarceration—the Developing Law*, 25 U. FLA. L. REV. 494 (1973); Robitscher, *Right to Psychiatric Treatment: A socio-Legal Approach to the Plight of the State Hospital Patient*, 18 VILL. L. REV. 11 (1972); Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755 (1969).

B. Where the State Has Assumed Custody of a Noncriminal Mentally Retarded Person for Whatever Reasons, It Has a Constitutional Obligation To Protect Him From Harm by Meeting His Fundamental Needs, Including His Needs for Personal Security and Appropriate Habilitation.

1. *The state has a due process obligation to protect respondent from attacks.*

The eighth amendment prohibition against cruel and unusual punishment has been held to preclude conditions of penal confinement which result in "serious deprivations of basic human needs," *Rhodes v. Chapman*, 49 U.S.L.W. 4677, 4679 (U.S. June 15, 1981) (No. 80-332).

The protection from harm that would be required for respondent if he were a prisoner includes protection from attack by other prisoners, *see Hutto v. Finney*, 437 U.S. 678 at 687 (1978), and from systemic abuses like those alleged here. *See, e.g., Haines v. Kerner*, 404 U.S. 519 (1972) (confinement conditions aggravating pre-existing physical illness and injury); *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972) (neglect of basic needs for food, air, sanitation and exercise).

While the concepts of "dignity, civilized standards, humanity and decency" embodied in the eighth amendment, *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), *quoting Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), are not directly applicable to nonpenal institutions, *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) and *Bell v. Wolfish*, 441 U.S. 520, 537 (1979), the conditions of confinement required by the eighth amendment in prisons must surely be included among the due process obligations imposed on state facilities for the mentally retarded. Due process does not require less from officials charged with the incarceration of innocent people who are afflicted with deficiencies in intellectual capacity than it does from jailers of convicted criminals. Indeed, this Court has consistently held that, outside of the prison context, the liberty protected by due process encompasses the "right to be

free from and to obtain judicial relief for unjustified intrusions on personal security." *See, e.g., Ingraham v. Wright*, 430 U.S. at 673 (1977).

No intrusions on the personal security of an institutional resident can be more unjustified than assaults by fellow residents which the state could prevent through adequate supervision and the provision of appropriate programs. Every lower federal court that has considered the question has determined that state officials who are responsible for operating institutions for the retarded or mentally ill have a duty to protect involuntarily committed persons from repeated attacks by other residents.[40]

Therefore, the court of appeals correctly held that respondent had a due process right to protection from harm which included the right to protection from attack by other residents.

2. ***The state has a due process obligation to provide respondent with habilitation programs to prevent loss of skills.***

Assuming that a mentally retarded person has a constitutional right to protection from harm, he necessarily has a right to habilitation. Although respondent was improperly deprived of the opportunity to offer such evidence at trial, mental retardation professionals believe that without a meaningful habilitation program, the mentally retarded residents of institutions will inevitably suffer regression and the loss of functioning skills. *See* section I, C, *supra*. Even with a humane environment, good nutrition and protection from assault, mentally retarded people will lose such vital skills as verbal com-

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[40] *See, e.g., Rogers v. Okin*, 634 F.2d 650, 655-56 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (U.S. April 20, 1981) (No. 80-1417); *Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978); *Harper v. Cserr*, 544 F.2d 1121 (1st Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1978); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *New York State Association for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

munication, walking and toilet training unless they are continually challenged to maintain those skills through a properly designed habilitation program. *See Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980), *aff'g Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *cert. denied*, 49 U.S.L.W. 3954 (U.S. June 22, 1981) (No. 80-827); *Wyatt v. Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972).

One federal court has explained that "there is no bright line separating" the right to treatment from the right to protection from harm. *New York State Association for Retarded Children v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975) (approving consent judgment affecting the Willowbrook developmental center). The court there accepted the stipulation of the parties that "a certain level of affirmative intervention and programming is necessary *if* [*the*] *capacity for growth is to be preserved, and regression prevented.*" *Id.* (emphasis added). In *amici*'s view, the Willowbrook opinion accurately describes the inextricable relationship between habilitation and protection for the mentally retarded.

IV. NONTHERAPEUTIC SHACKLING OF AN INVOLUNTARILY INSTITUTIONALIZED MENTALLY RETARDED PERSON VIOLATES HIS DUE PROCESS RIGHT TO BE FREE FROM PUNISHMENT.

The court of appeals properly found that the trial court erred by charging the jury that petitioners' alleged shackling of Nicholas Romeo to his bed for up to 12 hours per day, purely for staff convenience, must be judged solely by the cruel and unusual punishment standard of the eighth amendment. *Amici* agree with respondent's position in this Court that petitioners must justify the use of shackles on an institutionalized mentally retarded person by demonstrating that a compelling state interest necessitates their use. However, it is beyond question that a mentally retarded person involuntarily committed to a state institution has a right to be free

from punishment under the due process clause of the fourteenth amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979). Even under this less protective standard, the respondent is entitled to a remand for a new trial.

In a prison, punishment is a permissible state purpose. Nonetheless, the Court will review conditions of confinement in a prison to be sure that the eighth amendment prohibition against "cruel and unusual" punishment is not violated. *See Rhodes v. Chapman*, 49 U.S.L.W. at 4679; *Estelle v. Gamble*, 429 U.S. at 102 (1976).

In the case of persons confined without criminal conviction, this Court has examined conditions of confinement on a higher standard. *Bell v. Wolfish*, 441 U.S. 520 (1979), held that individuals confined prior to trial, without an adjudication of guilt, retain a right to be free from punishment under the due process clause.

Clearly, if punishment is impermissible for pretrial detainees after a determination of probable cause that they have committed a crime, punishment cannot be permissible for mentally retarded persons who are confined without being accused or convicted of any crime. As this Court noted in *Addington v. Texas*, "In a civil commitment state power is not exercised in a punitive sense." 441 U.S. 418, 428 (1979).

Of course, not every restriction imposed on residents in a state mental retardation institution amounts to punishment. Certain deprivations are a necessary part of confinement itself; others may be justified by legitimate state habilitation or protection purposes. Under the test set forth by this Court, to determine whether a challenged restriction is punishment, the trial court must first determine whether the restriction is imposed with a punitive motive. Even if plaintiffs have no evidence that state officials intended to punish, the trial court must go on to determine "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Bell v. Wolfish*, 441 U.S. at 538, *quoting Kennedy v. Men-*

doza-Martinez, 372 U.S. 144, 168-69 (1963). Thus, even when concededly legitimate state interests are put forward, the trier of fact must determine if the state has acted excessively harshly "to achieve objectives that could be accomplished in . . . alternative and less harsh methods." *Bell v. Wolfish*, 441 U.S. at 539 n.20. If so, an impermissible intent to punish may be inferred by the finder of fact. *Id.*

Applying these standards to petitioners' shackling of Romeo, *amici* believe that a properly instructed jury which had been permitted to hear all the testimony offered by the respondent could reasonably have concluded that petitioners' actions were punitive and had violated Romeo's due process rights.[41] However, the careful scrutiny required by *Bell* was effectively precluded by the trial court's improper exclusion of the expert testimony offered by respondent, which would have shown that the shackling lacked any habilitation rationale and instead was used for the convenience of staff.

Amici agree that habilitation which meets acceptable professional standards can provide a legitimate

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[41] In addition to the obvious severe deprivation of freedom of movement involved in shackling, a mentally retarded person shackled to a bed without attention, training or amusement quickly loses skills learned in programs or in a more normal environment, *see* notes 26, 27 & 28, *supra*, and may develop maladaptive or self-abusive behavior. Baumeister, *Origins and Control of Stereotyped Movements*, in QUALITY OF LIFE IN SEVERELY AND PROFOUNDLY RETARDED PEOPLE: RESEARCH FOUNDATIONS FOR IMPROVEMENT 353, 353-55 (C. Meyers ed. 1978); Forehand & Baumeister, *Body Rocking and Activity Level as a Function of Prior Movement Restraint*, 74 AM. J. MENTAL DEFICIENCY 608 (1970); Bigelow, *supra* note 5, at 42. Finally, studies have shown that shackling can cause serious physical injury. Picker, Poling & Parker, *A Review of Children's Self-Injurious Behavior*, 29 PSYCHOLOGICAL RECORD 435, 440 (1970); Guirguis, *Management of Disturbed Patients: An Alternative to the Use of Mechanical Restraints*, 60 J. CLIN. PSYCH. 295, 297 (1978) ("[p]hysical injury . . . at times can be irreversible"); Horner & Barton, *Operant Techniques in the Analysis and Modification of Self-Injurious Behavior: A Review*, 1 BEH. RESEARCH OF SEVERE DEV. DISABILITIES 61, 65 (1980).

justification for the use of restraints.[42] But under the shocking facts alleged in this case, and in view of the historic abuse of physical restraints in institutions,[43] in-

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[42] The permissible uses of restraint as an habilitation modality for mentally retarded persons are strictly limited. Restraints are properly used as a part of an habilitation program to remedy behavior which is seriously damaging to the individual or to others around him. Responsible clinicians view restraint as a treatment of last resort, where other techniques have been tried and have failed, Bigelow, *supra* note 5, at 43; National Association for Retarded Citizens, GUIDELINES FOR THE USE OF BEHAVIORAL PROCEDURES IN STATE PROGRAMS FOR RETARDED PERSONS (1976) [hereinafter cited as "NARC Guidelines"]. Petitioners do not contend that Romeo was restrained because he posed an imminent danger to the physical safety of himself, to staff or to other residents. The use of restraints in such an emergency situation would be justifiable.

By contrast to the use of shackles imposed on Romeo, an habilitation program using restraints aims to teach more appropriate forms of behavior. It is carefully planned by professional staff to discourage maladaptive behavior and to reward appropriate behavior and must be systematically applied and closely supervised. Moreover, to avoid the possibility of misuse, the professional literature recommends the use of strict guidelines specifying the maximum duration of the treatment and the conditions for release, and requiring staff to keep detailed records tracking the patient's progress. NARC Guidelines, *supra* at 27-28, 35; *see* BEHAVIOR MODIFICATION PROCEDURE: A SOURCEBOOK (E. Thomas ed. 1974).

These guidelines are recognized in the regulations governing use of restraint at Pennhurst, Tr. 5-229 - 5-230, and reflected in federal regulations governing the use of physical restraint in mental retardation facilities receiving Medicaid funds, 42 C.F.R. § 442.441 (limited to no longer than one hour). Defendants do not contend that they followed these procedures in the shackling of Nicholas Romeo.

[43] The professional literature acknowledges great potential for abuse of shackles for nontreatment reasons such as punishment or convenience. Guirguis, *supra* note 41, at 297 ("[a]t times staff can act out their own conflicts by way of punishing the patient"); NARC Guidelines at 35. The isolation of state mental retardation facilities from public scrutiny has historically fostered abuses unheard of in more open settings. Gardner, *Use of Punishment Procedures with the Severely Retarded: A Review*, 74 AM. J. MENTAL DEFICIENCY 86, 87 (1979).

cluding Pennhurst,[44] careful scrutiny of defendants' claims here was essential to distinguish punishment from legitimate treatment.[45]

In *amici*'s view, respondent should have been allowed to offer evidence that he was restrained because his behavior was annoying to staff and because it was easier to tie him down than to supervise or teach him.

The use of shackling solely for the convenience of staff simply cannot pass constitutional muster. Although administrative convenience would be another legitimate state purpose, the use of a means so harsh to achieve this purpose cannot be justified. *Bell v. Wolfish*, 441 U.S. at 539 n.20 (1979). Where training programs can easily be used to remedy an institutional resident's behavioral problems,[46] tying him to a bed for up to 12 hours a day over a year-long period is so disproportionate a response that it is impossible to view it as anything other than punishment under the standards established by this Court.

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[44] *See Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. at 1306-07.

[45] The technical use of the term "punishment" by some behavior modification experts to mean aversive procedures must not be confused with the term as used in the decisions of this Court cited above.

[46] *See* section I, C, *supra*; Baumeister, *supra* note 41, at 367, 379; Warren & Burns, *Crib Confinement as a Factor in Repetitive and Stereotyped Behavior in Retardation*, 8 MENTAL RETARDATION 25 (June 1970); Grabowski & Thompson, *supra* note 29.

If these techniques fail, time-out procedures (separating the resident briefly from activities he enjoys when he misbehaves), over-correction (requiring the restitution of misbehavior and repeated practice of correct behavior) and aversive conditioning (using planned aversive stimuli each time misbehavior occurs) have proven effective in eliminating even severely disruptive or self-abusive behavior patterns without resorting to the use of long-term restraint. Baumeister, *supra* note 41; Schroeder, Mulick & Schroeder, *Management of Severe Behavior Problems of the Retarded*, in HANDBOOK OF MENTAL DEFICIENCY: PSYCHOLOGICAL THEORY AND RESEARCH (N. Ellis ed. 1979); FOXX & AZRIN, *supra* note 30.

V. THE COURT OF APPEALS DID NOT ERR IN REMANDING THE CASE TO THE DISTRICT COURT FOR RESOLUTION OF THE QUALIFIED IMMUNITY QUESTION.

Amici support the qualified immunity which previous decisions of this Court give to state officials working in public facilities. In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court articulated a two-part test for qualified immunity. Under that test, an official is not immune:

> [I]f he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [person].

Id. at 322. Petitioners have represented that the second "subjective" part of the immunity test, which is a question of fact, is not at issue in this case. However, the question of malice was clearly raised on the record and evidence of malice was offered. Whether petitioners are liable under the "subjective" malice test is a question of fact for a jury to decide. *Procunier v. Navarette*, 434 U.S. 555 (1978); *see, e.g.*, Pet. App. at 90A; Tr. 2-130; Pet. App. 14a, n.20; Tr. 6-161.

The American Psychiatric Association, as *amicus*, has argued that state employees who are powerless to comply with constitutional mandates should be immune from damage suits. American Psychiatric Association Br. 24-26. But this is not a proper case in which to consider that policy argument because petitioners testified at trial below that the staff was wholly adequate to provide respondent with habilitation programs and supervision. Tr. 5-173, 6-12, 135-36. In any event, to adopt that approach would be to loosen the *Wood v. Strickland* standard and to immunize even those employees who knowingly violate the constitutional rights of the vulnerable residents of public facilities.

Amici believe that, as a policy matter, institutional residents must be able to recover damages against state employees who knowingly violate their constitutional rights. "Any lesser standard would deny much of the promise of § 1983." *Wood v. Strickland*, 420 U.S. at 322; *Owens v. City of Independence*, 445 U.S. 622 (1980). Furthermore, in Pennsylvania, as in many other states, public employees are indemnified by the state for nonmalicious civil rights liability. Thus, in fact, the penalty falls where it should—upon the state, which failed to provide resources sufficient to comply with constitutional requirements. But, as Congress recognized in passing 42 U.S.C. § 1983, the victim's only resourse is often an action for damages under the Civil Rights Act.

CONCLUSION

Because respondent was precluded by the trial court from introducing expert testimony to establish violations of his constitutional rights to appropriate habilitation, to protection from harm and to freedom from punishment, *amici* join respondent in respectfully urging this Court to affirm the court of appeals' reversal of the district court judgment and its remand of the case.

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CERTIFICATION OF SERVICE

I, Margaret F. Ewing, hereby certify that on September 23, 1981, I served by mail one copy of the foregoing Brief of *Amici Curiae* on Edmond A. Tiryak, Community Legal Services, 3638 N. Broad Street, Philadelphia, Pa., 19104, Counsel for Respondent, and on David H. Allshouse, Deputy Attorney General, Office of the Attorney General, 1641 Strawberry Square, Harrisburg, Pa., 17120, Counsel for Petitioners.

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Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1429

IN THE

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v.

NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Psychiatric Association (APA) was founded in 1844 and is the Nation's largest organization of qualified doctors of medicine specializing in psychiatry. Twenty-six thousand of the Nation's approximately 33,000 psychiatrists are members. Many psychiatrists work in mental facilities and psychiatrists generally bear a major responsibility for evaluating, developing programs for, and caring for the mentally-retarded. The APA has established a special commission dealing with problems of the mentally-retarded and has issued position papers relating to their care and treatment.

The APA has previously participated as *amicus curiae* in numerous cases involving mental health issues. See *Pennhurst State School and Hospital* v. *Halderman*, 49 U.S.L.W. 4363 (April 20, 1981); *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). The present case involves signficant issues regarding care of, and responsibility for, the mentally-retarded, including the establishment of constitutional standards for care and treatment and the likely imposition of personal liability on individuals unable to correct institutional inadequacies. The APA believes that its clinical experience and insight concerning the mentally-retarded can assist the Court in addressing the important issues in this case.

The parties have consented to the filing of this brief. Their letters are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

It is the position of the American Psychiatric Association that, having committed the mentally-retarded, the states must provide them with adequate habilitation and decent care. Although the fact of confinement imposes significant restrictions on individual liberty, due process nevertheless requires the states to take reasonable steps to protect remaining liberty interests where the intrusion on state interests is not substantial. See *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); pages 4-10 *infra*. Due process also requires the states to correct conditions of continuous hardship and deprivation. See *Bell* v. *Wolfish*, 441 U.S. 520 (1979); pages 10-14 *infra*.

We do not believe, however, that the states, in choosing among acceptable treatments and restraints, must also meet standards of compelling necessity or the least restrictive alternative. Although the Third Circuit, relying on cases in very different contexts, sought to make the existence of less restrictive alternatives controlling on clinical judgments, the existence of such alternatives should be only one factor in determining whether the

states have met basic standards of adequacy or decency. See pages 15-22 *infra*. This approach not only makes constitutional sense but more closely approximates the reality of habilitation in a mental facility, where patients reside in part because their capacity to cope with freedom is different from that of other persons. See pages 22-23 *infra*.

The decision below also raises the likelihood of individual liability for institutional failings. When the Constitution requires affirmative action by the states, and state officials cannot take that action by themselves, there is no justification for making the officials answerable in damages. To avoid this inequitable result, this Court should make clear either that individuals are not liable for constitutional torts without fault or that the defense of good faith immunity encompasses good faith efforts to satisfy constitutional standards. See pages 24-26 *infra*.

ARGUMENT

I. THE DUE PROCESS CLAUSE REQUIRES STATES TO PROVIDE RETARDED PERSONS WHO ARE INVOLUNTARILY COMMITTED WITH ADEQUATE HABILITATION AND DECENT CARE.

The due process clause, unlike the free speech clause, does not purport to speak in absolutes. The language of the clause itself indicates that states may deprive persons of liberty or property, or even life, provided that notions of due process are satisfied. But, to assure that these deprivations serve legitimate state ends, the due process clause imposes both procedural and substantive limitations on state action. See, e.g., *Parham* v. *J.R.*, 442 U.S. 584 (1979) (inquiry by neutral fact finder needed to protect children against improper commitment); *Addington* v. *Texas*, 441 U.S. 418 (1979) (clear and convincing evidence required for involuntary commitment); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975)

(state cannot provide custodial care to nondangerous individual capable of surviving without commitment). The more important the interest at stake, the more significant the limitations must be. See *Addington* v. *Texas*, *supra*, 441 U.S. at 423.

Having been involuntarily deprived of their liberty, the mentally-retarded have substantial interests in receiving adequate habilitation and decent care.[1] A lack of habilitation not only deprives committed persons of any chance to regain their freedom but makes the confinement itself little more than a custodial detention. The absence of decent care, of course, can cause severe physical and mental hardship over an extended period of time, as well as defeat the prospects for beneficial habilitation. These interests are thus at the core of life itself for the mentally retarded.

By contrast, the states can claim no overriding interest in withholding proper habilitation and care. The provision of adequate habilitation and care does not interfere with professional or administrative discretion, since the failure to provide such treatment arises from lack of funding not professional judgment. Although the states have a legitimate interest in restraining the cost of their programs, that interest must ultimately yield to the interest in having acceptable conditions for the involuntarily-committed mentally retarded.

A. Adequate Habilitation.

It is well-recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington* v.

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[1] The word "habilitation," rather than "treatment," is commonly used to refer to programs for the mentally-retarded because mental retardation is considered to be essentially a learning disability and training impairment rather than an illness. While psychiatric treatment may comprise part of a program for the mentally-retarded, the principal focus of habilitation is upon training and development of needed skills.

Texas, supra, 441 U.S. at 425. See *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972). Although this Court has acknowledged that the states have a legitimate interest in confining persons found dangerous to others or unable to care for themselves, it has also taken pains to assure that individual liberty is not unnecessarily withdrawn. See *Addington* v. *Texas, supra; O'Connor* v. *Donaldson, supra*. Thus, the Court has said that all persons have "a substantial liberty interest in not being confined unnecessarily for medical treatment . . ." *Parham* v. *J.R., supra*, 442 U.S. at 600.

We believe that the mentally retarded also have a substantial liberty interest in not being confined *without* treatment. While the rights of the involuntarily committed "may be diminished by the needs and exigencies of the institutional environment," *Wolff* v. *McDonnell*, 418 U.S. 539, 555 (1974), that does not mean that committed persons are "wholly stripped of constitutional protections." *Ibid.* Rather, as the Court indicated in *Wolff*, their liberty interests must be weighed against "restrictions imposed by the nature of the regime to which they have been lawfully committed." *Id.* at 556. In the final analysis, "there must be mutual accommodation between the institutional needs and objectives and the provisions of the Constitution that are of general application." *Ibid.*

The failure to provide adequate habilitation to the mentally retarded deprives them of liberty in a very real sense. For many, of course, the lack of habilitation will deny them their only real chance to regain their freedom, since mental retardation does not lessen all by itself. Habilitation is essential if retarded persons are to develop needed skills and assume greater responsibility for their own care, improvements that are necessary for the retarded to live independently or with the help of family or friends. See M. Rosen, *et al., Habilitation of the Handicapped*, 115 *et seq.* (1977); W. Wolfensberger,

The Principle of Normalization in Human Services (NIMH 1977); Pres. Comm. on Mental Retardation, *Mental Retardation: The Leading Edge* (1978). See generally Roos, *The Law and Mentally-Retarded People: An Uncertain Future*, 31 Stan. L. Rev. 613 (1979). Thus, although committed residents might otherwise become entitled to release as their need for care diminished, see *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 575, inadequate habilitation may effectively convert a temporary confinement to a permanent one.

Even if habilitation does not lead to eventual release, it can greatly increase the liberty achievable within the institution itself. It is as true in confinement as without that "[o]ne who is suffering from a debilitating mental illness and in need of treatment is [not] wholly at liberty . . ." *Addington* v. *Texas*, *supra*, 441 U.S. at 429. Adequate habilitation will lessen the dependency of retarded residents, allowing them to do more for themselves and to relate to other residents. At the very least, it will diminish the chance that the effects of retardation will be made worse by commitment. See Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 Notre Dame Law. 138, 146 *et seq.* (1972). The difference between the capacity to do things for oneself and the fate of total dependency is as much personal liberty as many mentally retarded people will ever know.

It is inherent in the nature of involuntary commitment that the confined resident must rely on the state to help him with his disability. In other circumstances, this Court has held that the states have an "obligation to provide medical care for those whom [they are] punishing by incarceration." *Estelle* v. *Gamble*, 429 U.S. 97 (1976).[2] The Court noted there that this obligation arises

[2] Although the standard adopted by the Court under the cruel and unusual punishment clause requires a showing of "deliberate indifference to serious medical needs," 429 U.S. at 106, we believe

from the fact of enforced dependence, observing that the incarcerated person "must rely on [the] authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Id.* at 103. The Court then stated: "[I]t is but just that the public be required to care for the [individual], who cannot by reason of the deprivation of his liberty, care for himself." *Id.* at 104, quoting *Spicer* v. *Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926) (internal quotation marks omitted).

This reasoning applies with ever greater force in the context of involuntary commitment. Not only is the retarded resident dependent on the state to meet his habilitation needs, but it is his disability that has led to commitment in the first instance. And the loss of skills, or other deterioration resulting from the failure to give habilitation, can cause pain and suffering every bit as real as the pain and suffering caused by an injured limb. See *Estelle* v. *Gamble*, *supra*, 429 U.S. at 103. Unless the Constitution is to be read to protect only bones and joints, these interests must be considered important as well.

We also think it significant that the states do not seek to commit all needy persons or all persons posing a danger to others. Rather, they have singled out the mentally-retarded (and the mentally-ill) for commitment on the basis of their particular conditions. See, e.g., 50 Pa. Stat. § 4406 (authorizing involuntary commitment of persons "mentally disabled and in need of care or treatment by reason of such mental disability").[3] Having made that

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that standard to be too severe in situations where no punishment at all is permissible. Since the mentally-retarded are confined through no fault of their own, the states should bear an affirmative obligation to give persons in involuntary custody adequate medical care. See pages 10-14, *infra*.

[3] The standards for commitment vary somewhat from state to state. In general, however, they authorize commitment upon a showing of mental retardation or mental disability and the need

distinction, however, the states should not be free to ignore it in setting the conditions of confinement. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 768 (1972).

We can discern no reasonable relation between the decision to make mental retardation an essential element of commitment itself and the decision to make it meaningless after commitment. The only rationale for confining the mentally-retarded, while not confining others who may be dangerous or unable to care for themselves, is the belief that mental retardation can be the subject of at least some habilitation, which in turn will assist the retarded person to care for himself.[4] That rationale fails, of course, if no habilitation is provided. Under those circumstances, commitment is no more than preventive detention without any connection to the condition underlying commitment in the first place. Although the Court has indicated that a state may treat what it cannot punish, see *Robinson* v. *California*, 370 U.S. 660 (1962),[5] it

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for care and/or treatment. A few statutes allow commitment of the mentally retarded if they are shown to be a danger to others. See generally, P. Friedman, *The Rights of the Mentally-Retarded* 33-34 (1976); S. Brakel and R. Rock, eds., *The Mentally Disabled and the Law* 34 *et seq.* (rev. ed. 1971).

[4] The basis for this distinction does not depend on whether the state is exercising its police power or its *parens patriae* power in making the commitment. Whatever power the state is using, it elects to use it not against the general population, but against the specific population of the mentally-retarded. The fact of mental retardation is thus a necessary element of every commitment, regardless of what the additional factors supporting commitment might be.

[5] The Court in *Robinson*, when dealing with narcotics addicts, went on to indicate that a state might subject persons suffering from mental illness or other afflictions to "compulsory treatment, involving quarantine, confinement, or sequestration." 370 U.S. at

has never suggested that a state may simply detain what it will not treat.[6]

While recognition of a right to habilitation may cause some states to expend additional funds, it will not otherwise interfere with important state interests. In particular, it will not interfere with professional discretion, for no one suggests that a lack of habilitation is positively desirable. Compare *Bell* v. *Wolfish*, 441 U.S. 520, 537-40, 545-48 (1979); *Rizzo* v. *Goode*, 423 U.S. 362, 377-78 (1976). Nor do we see any likelihood that it will disrupt efficient management of mental facilities. Unlike notions of compelling necessity or least restrictive alternative, which we discuss below, the idea of adequate habilitation does not force (or allow) courts to second-guess legitimate medical or administrative decisions on the ground that some other decision might have been preferable. It simply provides that, where important liberty interests can be enhanced without limiting the states' administrative or professional discretion, then the states must make reasonable efforts to do so.[7]

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666. But it is a very different matter to say that a state may enforce compulsory sequestration *without* treatment. Indeed, it would be illogical to prohibit a state from confining someone for 90 days for the "criminal offense" of being a narcotics addict but allow it to confine someone forever for that condition without making any effort to treat the person or help him regain his liberty.

[6] To our knowledge, every federal court to consider the issue has ruled that committed mentally-retarded and mentally-ill patients have a constitutional right to treatment or habilitation. See, e.g., *Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Gary W.* v. *Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part on other grounds*, 550 F. 2d 1122 (8th Cir. 1977). See generally Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190 (1974).

[7] This Court has rejected the notion that courts are incompetent to make a limited inquiry into whether adequate treatment is being provided. See *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 574 n. 10. See also *Rone* v. *Fireman*, 473 F. Supp. 92 (E.D. Ohio 1979).

The fiscal concerns of the states are, of course, significant ones. It will do little to help the mentally-retarded if standards are set so unrealistically that states simply leave retarded persons to fend for themselves rather than care for them at all. It is important, therefore, for reviewing courts to remember that public facilities cannot always provide ideal levels of care and that exaggerated demands on state resources for some persons may cause a denial of benefits for other needy people. But, in our view, the risk of occasional judicial excess is an acceptable price of assuring that involuntary commitment of the retarded is something more than a benign seclusion.

B. Decent Care.

It is obvious that efforts to provide adequate habilitation depend in large part on the decency of the immediate surroundings. A retarded person suffering from lack of food or sanitary living conditions, or living in constant fear of physical harm, can hardly be expected to benefit much from his habilitation program. It stands to reason, therefore, that an adequate environment for habilitation is as much a part of the right to habilitation as the habilitation program itself. See, e.g., *Wyatt* v. *Aderholt*, *supra*, 503 F.2d at 1313.

The duty to provide decent care does not depend solely upon the right to habilitation, however, for the Court has recently made clear that the due process clause imposes substantive limits on treatment of persons not convicted of any crime. See *Bell* v. *Wolfish*, *supra*, 441 U.S. at 533. Taking its cue from *Ingraham* v. *Wright*, 430 U.S. 651 (1977), a case in which it had refused to apply the cruel and unusual punishment clause to the administration of school discipline, the Court has established that "freedom from punishment [is] within the liberty of which no person may be deprived without due process of law." *Id.* at 535-36 n.17.[8] In this regard, the Court recognized that

[8] This test appears to derive from a similar, though presumably less stringent inquiry, in cases challenging prison conditions under

forcing persons "to endure genuine deprivations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment. . . ." *Id.* at 542. Alternatively, the Court noted that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court may permissibly infer that the purpose of the governmental action is punishment. . . ." *Id.* at 539.

Even giving all necessary deference to state officials (*id.* at 540-541 n. 23), therefore, the courts may properly examine conditions in state institutions to determine if they cause sustained privations and hardship or if they are unrelated to any legitimate goal. This inquiry is particularly appropriate in the case of state facilities for the mentally-retarded. If unsanitary facilities or inadequate food or protection may constitute cruel and unusual punishment, or punishment of any sort, the states have no reason whatsoever to inflict them on the mentally-retarded. As this Court has noted, "[i]n a civil commitment state power is not exercised in a punitive sense." *Addington* v. *Texas*, *supra*, 441 U.S. at 428.

We do not mean to draw too close an analogy between mental facilities and prisons: at times such facilities have been too much like prisons, not too litle. It must be remembered that the very purpose of a mental facility is to provide care for persons usually unable to care for

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the cruel and unusual punishment clause. Even though states have a legitimate interest in punishing persons convicted of crimes, the Court has emphasized that the interest does not stretch so far as to allow "serious deprivations of basic human needs" or denial of "the minimal civilized measure of life's necessities." *Rhodes* v. *Chapman*, 49 U.S.L.W. 4677, 4679 (June 15, 1981). The Court has also acknowledged that fears about such conditions, at least in prisons, are not fanciful, remarking that "conditions in a number of prisons, especially older ones, have been justly described as 'deplorable' and 'sordid'." *Id.* at 4680, quoting *Bell* v. *Wolfish*, *supra*, 441 U.S. at 539.

themselves. See *Schweiker* v. *Wilson*, 101 S. Ct. 1074, 1087 n. 3 (1981) (Powell, J., dissenting) ("a mental hospital is not a penal institution"). By definition, therefore, decent care is essential to the fulfillment of the state's interest in commitment. State prisons or detention facilities, on the other hand, serve the principal purpose of punishing inmates or assuring their attendance at trial, objectives to which the provision of care is simply an ancillary part. The adequacy of the conditions thus must be viewed with an eye to the nature and purpose of the institution involved.

It is also important to remember that the interests of the mentally-retarded are very different from the interests of other persons held in custody by the states. To begin with, involuntarily-committed persons have not been deprived of their liberty through any crime or fault of their own (as have convicted prisoners), or even through any preliminary findings of crime or fault (as have pretrial detainees). They have been confined solely because of a condition beyond their control and a demonstrated inability to cope with the incidents of freedom. Moreover, the retarded have an affirmative interest in receiving habilitation, an interest that can be severely undermined by inadequate conditions. See page 10 *supra*. And, even more importantly, confinement of the mentally-retarded may amount to a life sentence, causing the effects of any deprivations to be multiplied over the course of the confinement.[9] Some involuntarily-committed residents can never expect to have nourishing food or clean, sanitary facilities unless the state provides them.[10]

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[9] At Pennhurst, the average residency is twenty-one years. See *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1302 (E.D.Pa. 1978).

[10] The length of possible confinement strongly differentiates the mentally-retarded from pretrial detainees. In *Bell* v. *Wolfish*, for example, the Court noted that "[n]early all of the detainees are released within 60 days." 441 U.S. at 543. By definition, pretrial

Although the precise dimensions of proper care are not easy to define, and are better left for resolution in case-by-case fashion, they should include at least decent food, living conditions, clothing, medical attention, and protection from physical injury. See generally *Position Statement on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded*, 134 Am. J. Psychiat. 354 (1977).[11] Whether intended as punishment or not, a knowing denial of these essentials over an extended period of time would constitute a genuine hardship to retarded residents.[12] It cannot be doubted that retarded persons have real and substantial interests in living in adequate surroundings, eating nourishing food, receiving medical care, and living without needless fear. For the retarded, as for the non-retarded, those interests are the ingredients of a meaningful life.[13]

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detention facilities are *temporary* residences where the adverse effects of poor conditions are minimized by the brevity of the stay. For the mentally-retarded, however, the impact of inadequate food or protection may have no limit at all, consigning them to a lifetime of physical deprivation.

[11] As we discuss *infra*, a state need not justify any failure to provide protection by a standard of "substantial necessity." In our view, that standard cuts too deeply into clinical decisions about appropriate placements for individual residents. But state officials must demonstrate that, within the bounds of recognized programs, they have taken reasonable steps to eliminate unnecessary risks of harm.

[12] It may be assumed that occasional breakdowns and mishaps will result in any institutional setting. These temporary, inadvertent lapses would not seem to rise to the level of a violation of due process.

[13] Although there are persons outside of state custody who lack adequate living conditions and other essentials, we do not think that the state may consign the mentally-retarded to a miserable standard of living merely because they or other persons might suffer in the same way on the streets. Persons outside institutions at least are not totally dependent on state care and may find help from other sources, a chance denied to the involuntarily committed. See pages 6-7 *supra*. Moreover, this lowest-common-denominator

We see no reason to give particular deference to state officials in these matters. No official can reasonably claim that he is providing unventilated rooms, or inadequate toilet facilities, or revolting food because his professional judgment recommends it. Nor are such conditions reasonably related to the goals of helping the mentally-retarded or maintaining order within the institution.[14] If anything, the existence of such conditions affirmatively works against legitimate goals, by discouraging voluntary confinement, creating obstacles to habilitation, and stimulating disorder. The failure to provide decent conditions thus results only from an unwillingness or inability to meet basic standards, not from an exercise of professional discretion.

Nor is it a sufficient answer to suggest that fiscal concerns should be held paramount. While significant, see p. 10 *supra*, these concerns must give way to the need to assure that basic human needs are met. Having authorized involuntary commitment of the mentally-retarded, the states cannot then decide that decency is a luxury they cannot afford. In the end, it is better to have no commitment at all than a system of commitment through which the states neglect or abuse their citizens.[15]

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theory would operate as the mirror image of "least restrictive alternative" analysis, establishing the lowest possible threshold rather than the highest possible one.

[14] In the case of prisons, at least, states may have an affirmative interest in seeing that the surroundings convey a spartan character, assuring that prisoners remember that confinement is in fact punishment. The states have no such interest with regard to a facility for the retarded. The courts thus must make sure that conditions meet a minimum standard for persons who may not be punished at all.

[15] Although the cost of upgrading prisons or detention centers would not be insubstantial, the Court has noted the "deplorable conditions and draconian restrictions of some of our Nation's prisons," adding that "the federal courts rightly have condemned these sordid aspects of our prison systems." *Bell* v. *Wolfish*, *supra*,

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE STATES TO MEET STANDARDS OF COMPELLING NECESSITY OR THE LEAST RESTRICTIVE ALTERNATIVE.

If the Third Circuit had ordered a new trial for respondent according to standards of decent care and adequate habilitation, we would be in agreement with that decision.[16] But the Court of Appeals went well beyond that point, imposing standards of compelling necessity (for shackling), substantial necessity (for failure to protect from attacks), and the least restrictive alternative (for certain treatment decisions).[17] These standards are unnecessary in constitutional terms and largely inscrutable in clinical terms.

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441 U.S. at 562. It is plain, therefore, that at some point the states must either meet elemental standards or forgo enforced confinement altogether.

[16] We agree with the court of appeals that the district court improperly relied on standards established under the cruel and unusual punishment clause in setting the duty of care and treatment. See *Ingraham* v. *Wright*, 430 U.S. 651, 664-71 (1977).

[17] The court of appeals held that shackling must be justified by a showing of compelling necessity and be the least restrictive alternative; that a failure to provide protection must be justified by a showing of substantial necessity; and that treatments involving a significant deprivation of liberty must be the least intrusive available under the circumstances. Although the decision regarding treatment might be limited to selection of treatment approaches and programs involving surgery or the administration of certain medications, we note that the court of appeals has applied the same analysis to the place of confinement and the right to administer medication without consent in later cases. See page 18, *infra*.

In the discussion that follows, we focus primarily on the standards of compelling necessity and, in particular, the least restrictive alternative. We find no basis, however, for using a standard of "substantial necessity" to evaluate the failure to provide protection, since it requires the courts to decide whether decisions regarding treatment and the placement of residents are not just reasonable and medically appropriate, but substantial as well. That is an injury for which the courts are poorly equipped, particularly when reviewing complicated decisions about maintaining order in an institutional setting.

The doctrine of least restrictive alternative does not travel well from its familiar terrain, see, e.g., *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), to the substantive due process area. Although the existence of a less restrictive alternative is a relevant factor in assessing the rationality of any state action, its role as an *independent* basis for striking down state action should be limited to situations, like those involving restraints on First Amendment freedoms, where any state action is considered highly suspect. See, e.g., *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Similarly, the need for a showing of compelling necessity should be confined to cases, such as ones involving distinctions based on race, where the operative presumption is that no state action of the sort is permissible. See, e.g., *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 290 (1978) (Powell, J.). In cases based solely on notions of substantive due process, which already tend to involve the risk of substituting judicial preferences for legislative ones (see page 10, *supra*), a resort to the doctrine of least restrictive alternative should be skeptically viewed.

The Third Circuit apparently justified its use of such rigid standards on the ground that shackling, treatment, and protection all involve issues of liberty or bodily security. But, once a state has lawfully confined a person in a hospital or detention facility, it cannot be said that any subsequent actions involving intrusions on liberty or security are presumptively invalid. The very nature of such institutions, even those run in a humane and enlightened fashion, requires affirmative acts and restrictions that would be out of place in society at large. To isolate those acts and restrictions, and then judge them by the strictest standards applicable outside prison or hospital walls, is a constitutional anomaly.

This Court, in fact, has said as much in its recent cases. In *Bell* v. *Wolfish*, *supra*, for example, the Court

refused to invalidate the practice of "double bunking" pretrial detainees despite evidence that overcrowding could be relieved in other ways less intrusive on personal liberty. Noting that the existence of other methods did not mean that the method chosen by the government was unreasonable, the Court remarked: "Government action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." *Id.* at 542-43 n.25. Similarly, in *Ingraham* v. *Wright*, *supra*, the Court upheld the practice of administering "reasonable corporal punishment" to schoolchildren, in the face of attacks under the Eighth and Fourteenth Amendments, although "the availability of less severe but equally effective means of discipline" was but one of several factors to be weighed in determining whether the punishment was reasonable. *Id.* at 662.

It is also indicative that, when confronted with an appeal insisting upon a right to placement in the least restrictive environment, this Court dismissed it for want of a substantial federal question. *Sanchez* v. *New Mexico*, 396 U.S. 276 (1970).[18] Although the Third Circuit gave *Sanchez* short shrift, stating that "[t]here have been substantial doctrinal developments since *Sanchez* in the mental health field," it nowhere explains what developments of a constitutional nature make an insubstantial position now compelling. Viewed more realistically, the developments since *Sanchez* show a concern for assuring basic standards of decency without the sort of intrusion on professional discretion that the least restrictive alternative doctrine involves. See pages 16-17 *supra*.

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[18] Although *Sanchez* dealt with the least restrictive alternative issue in the context of the choice of a facility, rather than the choice of a particular treatment, its rationale would control here. If anything, the long-term liberty interests implicated by the choice of a residential placement would seem to be greater than those implicated by a choice among treatments or restraints.

The intrusion on professional judgment in these matters is difficult to overstate. For, just as the constitutional beginnings of "least restrictive" analysis are uncertain, so are its logical ends. Having set the doctrine in motion in *Halderman* v. *Pennhurst State School and Hospital*, 614 F.2d 84 (1979) (en banc), reversed, 49 U.S.L.W. 4363 (April 20, 1981), albeit as a matter of statutory construction there, the Third Circuit has been swept along to hold that particular treatments and shackling must be the least restrictive means available (this case), that the place of confinement must be the least restrictive (*Scott* v. *Plante*, Nos. 80-1314, 1315, 1596 (February 5, 1981), cert. petition pending, No. 80-1699), and that use of medication over objection must be the least restrictive form of treatment possible (*Rennie* v. *Klein*, Nos. 79-2576 and 2577 (July 9, 1981) (en banc)), all as a matter of substantive due process. The fault of this analysis is not that each holding fails to follow from the other, but that they follow all too well, leading the courts to an ever greater role in the selection of a particular treatment, or restraint, or residence, or drug, or dosage, at the expense of other hitherto permissible ones. That is an unfortunate momentum for a theory that never should have gotten started at all.

This Court has repeatedly made clear that judges are not to substitute their own views, in the guise of constitutional edicts, for the reasonable judgments of state officials. In the prison context, for example, the Court has pointed out that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform." *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974). Although this realistic assessment does not mean that judges should abdicate their role as arbiters of the Constitution, it does mean that, at a minimum, they should remember that "[t]he wide range of 'judgment calls' that meet Constitutional and statutory requirements are confided to officials outside of the Judicial

Branch of Government." *Bell* v. *Wolfish*, *supra*, 441 U.S. at 562.

This note of caution is especially appropriate in the complex fields of mental health and mental retardation. As this Court has recognized, many issues regarding the need for treatment "turn[] on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington* v. *Texas*, *supra*, 441 U.S. at 429. It is a simple truth that "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." *Parham* v. *J.R.*, *supra*, 442 U.S. at 607, quoting *In re Roger S.*, 19 Cal. 3d 921, 941 (Clark, J. dissenting) (internal quotation marks omitted). "The mode and procedure of medical diagnostic procedures is not the business of judges. What is best for a [patient] is an individual medical decision that must be left to the judgment of physicians in each case." *Id.* at 607-08.

The wisdom of these observations can be readily seen in this case. Although the Third Circuit made a conspicuous effort to separate legal and medical doctrines, it is fanciful to distinguish the shackling and protection issues, described by the court as "undiluted legal concerns," from the treatment issues, said to "entail[] mixed questions of law and medical judgment." Pet. App. 14a. Decisions about restraints and exposure to other residents, matters directly involving the risks and benefits of freedom and social interaction, are frequently made in the context of an overall treatment program. See Rosen *et al.*, *The Role of Physical Restraint in the Treatment of Psychiatric Illness*, 39 J. Clin. Psychiat. 228 (1978); Burstein, *Using Mechanical Restraints on Acutely Disturbed Psychiatric Patients*, 26 Hosp. & Comm. Psychiat. 757 (1975); Soloff, *Physical Restraint and the Nonpsychotic Patient: Clinical and Legal Perspectives*, 40 J. Clin. Psychiat. 302 (1979). Indeed, the

Third Circuit itself recognized (without any apparent effect) that restraints may be part of an acceptable form of therapy, Pet. App. 20a n. 29, and that it may be "therapeutically more desirable to have an admittedly aggressive patient mingling with others instead of confined to an isolated cell." Pet. App. 26a n. 8. See discussion of this issue in Gutheil, *Restraint Versus Treatment: Seclusion as Discussed in the Boston State Hospital Case*, 137 Am. J. Psychiat. 718 (1980); Gair, *Limit-Setting and Seclusion in the Psychiatric Hospital*, Psychiat. Opinion 15 (Feb. 1980); Gutheil, *Observations on the Theoretical Bases for Seclusion of the Psychiatric Inpatient*, 135 Am. J. Psychiat. 325 (1978); Soloff, *Behavioral Precipitants of Restraint in the Modern Milieu*, 19 Comprehen. Psychiat. 179 (1978); Plutchik, *et al.*, *Toward a Rationale for the Seclusion Process*, 166 J. Nervous & Mental Disease 571 (1978). The statement that these are solely legal issues shows quite vividly the problem caused by judges making clinical decisions.

The problem is made worse by the view of the court of appeals regarding treatment. Although the court allows some decisions to be justified as "acceptable . . . in light of present medical or other scientific knowledge," Pet. App. 38a, it goes on to say that any decision involving "significant deprivations of liberty" may be tolerated only if it "provided for the least intrusive treatment available under the circumstances." Pet. App. 47a. The court of appeals thus has forced state physicians to choose a particular mode of treatment (determined after the fact according to an ephemeral "least intrusive" standard) even though another form of treatment would be acceptable or even preferable from a medical standpoint. Indeed, under this doctrine, doctors seemingly will be liable for constitutional torts where they would not be liable for malpractice under state law.

It must be recognized that, while the notion of a least restrictive treatment is superficially enticing, the concept

in practice may be almost unworkable. To begin with, it is not apparent that the least restrictive alternative is always the best from a clinical standpoint, even if treating physicians can figure out what it is. See *Hoffman et al., Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 S. Diego L. Rev. 1100 (1977); Perr, *The Most Beneficial Alternative: A Counterpoint to the Least Restrictive Alternative*, VI Bull. of Am. Ac. of Psychiat. and the Law, No. 4, iv (1978); Bachrach, *Is The Least Restrictive Alternative Always the Best? Sociological and Semantic Implications*, 31 Hosp. & Comm. Psychiat. 97 (1980); Appelbaum, *Least Restrictive Environment: Some Comments, Amplification*, 31 Hosp. & Comm. Psychiat. 420 (1980).[19] Moreover, as a practical matter, it may not be possible to identify the least restrictive alternative at all. It is extremely difficult, for example, to tell whether confinement to a room is more or less restrictive than use of shackles or administration of a drug that permits the resident to remain with other residents in a group situation. The difficulty is made worse by the fact that some treatments may be more intensive but of shorter duration, forcing doctors to balance the restrictiveness of a short-term treatment imposing substantial restraints

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[19] Without identifying any medical basis for its view, the Third Circuit adopted a principle that treatment in state facilities must be risk-averse. Noting that individuals are usually allowed to err on the side of risk, the court nonetheless declared that "[w]hen the state is the decision-maker, the converse would seem appropriate: such actions should err on the side of safety." Pet. App. 32a n. 45. Although safety considerations are part of any medical judgment, see Perr, *The Most Beneficial Alternative: A Counterpoint to the Least Restrictive Alternative*, VI Bull. of Am. Ac. of Psychiat. & the Law No. 4, iv., vii (1978), the decision below would force physicians to elect only the safest treatment for state residents even though more effective treatments would be followed for other retarded persons. The record of a single action for damages is not an adequate basis for so fundamental a reordering of state treatment programs.

against a longer course of treatment with less restraints. Furthermore, the lessening of restrictions for one resident may lead to an increase in restrictions on other residents. To determine a single supposed least restrictive treatment for each resident from this complex of variables is beyond the power of most doctors and, we suspect, most judges as well.

We do not believe that due process requires this sort of judicial second opinion. The existence of a least restrictive alternative is not, nor should it be, the last word in medical decisions; rather, it should be one of numerous factors to be assessed in determining whether state officials have acted in an acceptable fashion. It plainly bears on the rationality of state action that officials chose a peculiarly harsh method of achieving their ends while far more reasonable and effective means were at hand. Indeed, the *weighing* of alternatives is part of any responsible medical decision. But the *choice* among alternative treatments, provided that they meet reasonable standards, is properly one for the professional decision-maker to make.

This doctrine not only is consistent with constitutional principles but more closely approximates the realities of operating a facility for the retarded. Although state officials and courts must be sensitive to the liberty interests of retarded persons, see pages 5-6 *supra*, the fact remains that retarded persons are committed precisely because they cannot cope with liberty in the same way as other persons. *Addington* v. *Texas*, *supra*, 441 U.S. 427-30. The process of commitment itself depends on both a showing of mental retardation and some indication of an inability to remain at large. Once a retarded person has been confined, decision after decision will involve an assessment whether he can tolerate increased responsibility or must be subject to additional restrictions. Under these circumstances, the balance between liberty and restraint must have differing points of equilibrium.

We also question the idea that the provision of acceptable medical treatment within an institution may nonetheless violate the liberty interests of its residents. It is not unreasonable to suppose that a broad range of permissible treatment and restriction, left largely to the professional discretion of the staff, is inherent in the original commitment to a state facililty. Indeed, the due process safeguards preceding admission are intended to insure that these significant limitations are imposed only in proper cases. See *Addington* v. *Texas*, *supra*. Once admission has been legally authorized, however, it also stands to reason that conduct within that permissible, anticipated range does not amount to a constitutional violation. Under this view, only conduct falling below the acceptable standards, either because of the unusual severity of a particular isolated occurrence or because of a more systematic, repetitive abuse of basis standards, would infringe a constitutional right.

It can only trivialize constitutional rights to make civil rights actions a backup for unsuccessful malpractice suits. Although constitutional rights need not depend in kind or degree upon state rights, it nevertheless seems strained to say that committed patients may collect damages under the due process clause for a level of treatment about which most patients would have no legal complaint. The fact of state custody and lack of choice, which distinguish the committed person from other retarded persons, do not call for a different, basic standard of treatment, but rather for a searching inquiry into whether basic standards are being met. It is that inquiry, not one into the mysteries of least restrictive alternatives, that the courts should diligently make.

III. THIS COURT SHOULD MAKE CLEAR THAT LIABILITY MAY NOT BE IMPOSED WITHOUT FAULT FOR CONSTITUTIONAL TORTS.

The decision below also carries the implication that state employees will be held liable for constitutional violations over which they have little or no control. Although the Third Circuit appears to recognize a defense of good-faith immunity whenever "the official or employee was not aware, or had no reason to be aware, of [the particular constitutional] rights," Pet. App. 43a, that statement of the defense does not necessarily protect state employees at institutions that are understaffed or lack adequate facilities. These employees may simply be powerless to provide care and treatment at acceptable levels without additional funding. It is illogical, as well as inequitable, to hold them personally liable under such circumstances.

The inequity in this situation arises from several sources. In one sense, it stems simply from efforts to find a defendant to hold liable for violations of constitutional standards. Sovereign immunity shields the states from liability in damages for past wrongs, although they may be compelled to take corrective action in the future. See, e.g., *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Thus, the courts must make do with whomever they can get before them, typically the individuals responsible for carrying out state efforts.

The problem is compounded by the awkward distinction between affirmative conduct and inaction. When government officials have taken affirmative action to deny someone his constitutional rights, by initating an unlawful search or seizure, or by ordering or participating in a physical attack, it is a relatively straightforward matter to find persons at fault. See, e.g., *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Scheuer* v. *Rhodes*,

416 U.S. 232 (1974). Implicit in this theory, however, is the idea that the defendant had an opportunity to respect constitutional rights and did not, an opportunity that is not in fact always open to state employees. Where steps must be taken to implement constitutional rights, there needs to be some recognition of the fact that a particular defendant cannot always take those steps himself.

The issue is one not of the wrong itself, but of responsibility for it. Unlike malpractice standards, which vary according to circumstances, it is not desirable to lower the substantive constitutional standards themselves to accommodate problems caused by lack of funding. To the extent that the state is responsible for indecent conditions, even if individual employees are not, the standards should be exacting enough to support an award of injunctive relief. See, e.g., *Ex Parte Young*, 209 U.S. 123 (1908). But the susceptibility of the state to an injunction should not mean that damages must be visited on its employees for institutional wrongs.

One solution to this problem is simply to recognize that the immunity defense encompasses not only ignorance of constitutional standards, but good-faith efforts to meet them. It is entirely possible, even likely, that state employees in mental hospitals or similar facilities may be acutely aware of their failure to meet constitutional standards but, at the same time, simply have no capacity to do much better. Whatever the law may require of state or federal *governments*, it makes little sense to insist, at pain of damages, that *individuals* do more than they possibly can do. At best, such a doctrine exacts relief from the wrong party; at worst, it will drive needed state employees to other jobs, further damaging the very institutions that plaintiffs seek to improve. See Note, *Psychiatry in the Public Sector*, 80 Hosp. & Comm. Psychiat. 749 *et seq.* (1974)

Another solution is to acknowledge that recovery for constitutional torts must depend upon a showing of fault. We see no reason for establishing a constitutional doctrine of *respondeat inferior*, penalizing employees for wrongs committed by their immune employer. To impose liability on a particular defendant, it is never enough simply for the plaintiff to prove that he suffered injury: he typically must show that his injury was actually caused by the particular defendant. The fact that the state has absolute immunity is not a basis for inventing a different rule here.

CONCLUSION

The judgment of the Court of Appeals should be vacated and the case remanded for a new trial in accordance with the principles set forth herein.

Respectfully submitted,

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AUG 1 1981

ALEXANDER L. STEVAS
CLERK

No. 80-1429

In The

Supreme Court of the United States

October Term, 1981

DUANE YOUNGBERG, ET AL,
Petitioners,
vs.
NICHOLAS ROMEO, an incompetent,
by his Mother and Next Friend, PAULA ROMEO
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICI CURIAE BRIEF OF THE STATES OF CONNECTICUT, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, VIRGINIA, WASHINGTON AND WEST VIRGINIA IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE

The last ten years have seen a significant improvement in conditions at state mental retardation facilities. The population of the large institutions has declined significantly[1] and habilitative services within many of the institutions have improved markedly by virtue of participation in the Intermediate Care Facilities/Mental Retardation Program under Title XIX (Medicaid) of the Social Security Act.[2]

Although this Court has offered guidance on the procedural safeguards that must be followed before an involuntary commitment, *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979), and has ruled on the state interests that are sufficient to justify a commitment, *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), *Jackson* v. *Indiana*, 406 U.S. 715 (1972), very little has been resolved regarding the impact of the Constitution on the condition of state mental retardation facilities. This *amici curiae* brief is sponsored

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[1]One study has found that the population of public mental retardation facilities declined from a peak of 193,200 in 1967 to 168,300 by 1975. Government Accounting Office, Returning the Mentally Disabled to the Community: Government Needs to do More (1977). Another study found that the population of public institutions had declined to 133,738 by 1979 and that state projections called for an eventual decline in population to 95,093. National Association of State Mental Retardation Program Directors, Inc., Trends in Capital Expenditures for Mental Retardation Facilities: A State-by-State Survey (1980).

[2]As of 1977, 100,892 retarded persons resided in ICF/MR certified facilities, the great majority of whom resided in public institutions. Taylor, *et al.*, Title XIX and Deinstitutionalization: The Issue for the 80's (1981) p. 15.

by the States of Connecticut, Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Louisiana, Maine, Michigan, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Virginia, Washington and West Virginia, by their respective Attorneys General.* The states are "interested" in this case because it affords this Court the opportunity to define clearly and comprehensively the constitutional standards of care in state mental retardation facilities. In order to plan their mental retardation services, it is of paramount concern to the states that this Court issue a definitive ruling on all issues that are presented for review.

The *amici* states are also "interested" because the Court below issued erroneous, conflicting and unworkable standards (discussed *infra*). Although the *amici* states are interested in all of the issues presented for review, the holding of the Court below that the states must provide "adequate" habilitative services,[3] Pet. App. 12a-13a, 27a, 29a, 47a, and the application of less drastic means analysis to the conditions of "confinement," Pet. App. 29a-38a, 47a, are of particular concern to the states.

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*Therefore, consent of the parties is not required for the filing of this *amici curiae* brief. U.S.S. Ct. Rule 36.4.

[3]Mentally retarded clients suffer from a state of diminished cognitive abilities/adaptive behavior that cannot be "cured" by "treatment." "Habilitation" is the term used to describe the provision of various "programs" (e.g. behavior modification, education, vocational rehabilitation, etc.) in an attempt to improve the client's level of functioning. The term "treatment" is used interchangeably with the term "habilitation" in the professional literature and lower court decisions and will be used interchangeably in this brief. To be distinguished, however, is medical treatment of illnesses/injuries, which is generally considered to be part of "care and custody" rather than "habilitation" or "treatment."

Up until the last several years, state mental retardation officials were generally recognized as being sympathetic to and supportive of class action litigation designed to improve the quality of life for their clients.[4] In recent years, however, the profession has become increasingly divided and is now in a state of total disarray over two issues: 1) whether *all* retarded clients can profit from habilitative services in a meaningful way; and of far greater concern 2) whether "least restrictive" care (assuming that the "least restrictive" care can be identified) is necessarily the best or the most appropriate care available.

The issue of whether all clients can profit from habilitative services is highlighted by the most recent developments in the frequently cited *Wyatt* litigation. *Wyatt* v. *Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972) *aff'd in part, remanded in part and rev'd in part, Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). In 1978 the State of Alabama Moved to Modify the Standards for Minimally Adequate Care and enlisted the support of a team of experts that included several of the leaders of the profession. The experts inspected the Partlow State School and concluded that a substantial number of clients had failed to benefit from Court ordered habilitative services.

> In Partlow, about two-thirds are not fully toilet trained. Records show that training has occurred over the years — toileting, bathing, dining, dressing, social, and academic skills. A careful analysis of those records reveals negligible progress for most. It is certainly not uncommon to find that a self-help skill has been taught for several years without sig-

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[4]See generally, Rosenberg, *et al., Developmental Disability Law: A Look into the Future*, 31 Stan. L. Rev. 817, 820 (1979). Obviously, a Court Order helps to insulate state facilities from the normal budgetary process.

> nificant progress....Moreover, those receiving the most intensive training, during that interval experienced no more progress than those who had received little.[5]
>
> Ellis, *The Partlow Case: A Reply to Dr. Roos,* Law and Psych. Rev. 15, 19 (1979).

A subsequent review of the professional literature was in accord with the teams finding at the Partlow School.

> On the basis of these data it cannot be concluded that profoundly retarded persons will acquire a particular skill. Yet statements of the type 'profoundly retarded persons can be taught self-help skills' are frequently made....The basis for such pronouncements is provided by evidence that *some* profoundly retarded persons learn *some* particular skill, to *some* level of mastery. None of the studies cited by Dr. Roos in support of his claim provides evidence that *all* profound/severely retarded persons can "benefit

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[5]The experts argued that an enriched recreational program should be substituted for habilitative services when the client does not significantly respond to habilitative services. The Court, acknowledged that "habilitation of some residents will only lead to modest improvements in very basic skills," but ruled that "...these facts highlight the flexibility, ingenuity, and care which must be invested in fashioning habilitation programs which will maximize a resident's human abilities and will enhance his ability to cope with his environment." *Wyatt* v. *Ireland,* No. 3195-N (M.D. Ala. October 25, 1979) p. 14.

very significantly...." Indeed no such studies exist.[6] *Id* at 23. (emphasis in original)

The issue of "least restrictiveness" is highlighted by the *Pennhurst* litigation which is familiar to this Court. *Halderman* v. *Pennhurst State School and Hospital,* 446 F.Supp. 1295 (E.D. Pa. 1977), *substantially aff'd on other grounds,* 612 F.2d 84 (3rd Cir. 1979) (*en banc*), *rev'd and remanded,* 101 S.Ct. 1531 (1981). The District Court held that all of the residents of the state facility had a constitutional right to treatment in the "least restrictive setting," 446 F.Supp. at 1319, 1320, that an institution was never the least restrictive setting, *Id.* 1320, 1325, and that the State of Pennsylvania has an obligation to create alternative community living arrangements. *Id.* at 1326. The *Pennhurst* decision has spawned tremendous controversy and conflict within the profession concerning the suitability of community living arrangements for many of the residents of state facilities, especially those profoundly/severely retarded residents who are aggressive/assaultive, self-abusive, non-ambulatory, multiply-handicapped, medically fragile or aged and resistive

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[6]On the issue of whether *all* of the mentally retarded residents can benefit from training, it is suggested that this Court refer to a symposium entitled "Are All Children Educable?" that appears in 1 Analysis and Intervention in Developmental Disabilities No. 1 (1981) (Pergamon Press). In particular this Court is referred to the following articles: Bailey, *Wanted: A Rational Search for the Limiting Conditions of Habilitation in the Retarded,* 1 Analysis and Intervention in Developmental Disabilities No. 1, 45 (1981); Kauffman, *et al., The Cult of Educability: Searching for the Substance of Things Hoped For; The Evidence of Things Not Seen,* 1 Analysis and Intervention in Developmental Disabilities No. 1, 53 (1981); Baumeister, *The Right to Habilitation: What Does it Mean?,* 1 Analysis and Intervention in Developmental Disabilities, No. 1, 61 (1981).

to leaving.[7] Throne, *Deinstitutionalization: Too Wide a Swath,* 17 Mental Retardation 171 (1979); Eyman, *et al., Maladaptive Behavior and Community Placement of Mentally Retarded Persons,* 82 Am. J. of Mental Deficiency No. 2, 137 (1977); Balla, *Relationship of Institution Size to Quality of Care: A Review of the Literature,* 81 Am. J. of Mental Deficiency, No. 2, p. 117 (1976); Eyman, *et al., Patterns of Care for Mentally Retarded Persons,* 18 Mental Retardation No. 2, p. 63 (1980); Bachrach, *Is the Least Restrictive Environment Always the Best? Sociological and Semantic Implications,* 31 Hosp. and Comm. Psychiat. 97 (1980); Perr, *The Most Beneficial Alternative: A Counterpoint to the Least Restrictive Alternative,* VI Bull. of Am. Ac. of Psychiat. and the Law, No. 4, IV (1978).

In addition to the strong professional disagreement over "least restrictive" treatment, every study of parental attitudes toward deinstitutionalization indicates strong parental opposition. Meyer, *Attitudes of Parents of Institutionalized Mentally Retarded Individuals Toward Deinstitutionalization,* 85 Am. J. of Mental Deficiency, No. 2, 184 (1980); Payne, *The Deinstitutional Backlash,* 14 Mental Retardation 43 (1976).

Notwithstanding the strong professional and parental opposition to a mandatory requirement of "least restrictive" care, a segment of the profession has turned to the Courts in an attempt to obtain a judicial resolution of the professional

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[7]Significantly, the leading professional organization, The American Association of Mental Deficiency, has withdrawn its support from the plaintiffs in the *Wyatt* litigation due to its concern that the plaintiffs would attempt to turn the focus of the litigation into a *Pennhurst* style case. Berkowitz, *AAMD National Office News,* 17 Mental Retardation No. 1, 47, 48 (1979).

dispute. The states are currently deluged with the *"Pennhurst"* styled litigation.[8] This case presents the opportunity for this Court to decide whether the Constitution requires the states to select the "least restrictive" care available. It is of paramount concern to the *amici* states that they be able to provide appropriate care unbridled by a requirement that the care be the "least restrictive" alternative.[9]

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[8]The cases include: *Connecticut Ass'n for Retarded Citizens* v. *Thorne*, No. H-78-653 (D. Conn.); *Illinois Association for Retarded Citizens* v. *Thompson*, No. 80-C-0914 (N.D. Ill.); *Association of Retarded Citizens of North Dakota* v. *Link*, No. A1-80-141 (D.N.D.); *New Jersey Association for Retarded Citizens, Inc.* v. *Klein*, No. 79-1632 (D.N.J.); *Scott* v. *Plante*, No. 73-1052 (D.N.J.); *Garrity* v. *Gallen*, C.A. No. 78-116 (D.N.H.); *Henkin* v. *Department of Social Services*, 78-4088 (D.S.D.); *Washington Association for Retarded Citizens* v. *Thomas*, No. C-79-1235V (W.D. Wash.); *Medley* v. *Ginsberg*, C.A. No. 78-2099 CH (S.D. W.Va.).

[9]The case below applies the principles of least restrictive analysis to treatment methodologies within an institution as opposed to the majority of lower court cases (discussed and cited, *infra*) which have been concerned with the choice of residential placement. The applicability of least restrictive analysis to either situation appears to be governed by the same principles of law and the *amici* states will, therefore, discuss the propriety of applying least restrictive analysis to both situations. A petition for a writ certiorari from another decision of the Third Circuit Court of Appeals that found that the criminally insane have a right to be treated in the least restrictive setting is currently before this Court. *Scott* v. *Plante*, 641 F.2d 117 (3rd Cir. 1981), *cert. pending* 49 U.S.L.W. 3790 (April 21, 1981). Pet. App. 116a-160a.

SUMMARY OF ARGUMENT

Fortified by an erroneous understanding of the nature of mental retardation, the Court below issued a series of conflicting and unworkable constitutional standards governing the care and treatment of the mentally retarded in public facilities. The standards adopted by the Court below unreasonably interfere with professional discretion by forbidding otherwise appropriate care if "less intrusive" care is available and will result in a flood of litigation against the states and a retrenchment of state mental retardation programs.

In holding that there is a state deprivation of liberty when a parent initiates a commitment pursuant to a statute which is not subject to attack, the Court below failed to understand that the role of the states is to provide necessary services for its citizenry to the extent that the state is willing to expend the necessary resources to provide such services. Furthermore, assuming that there is a state denial of liberty when a relative initiates a commitment into a state facility, active "treatment" is not constitutionally required since the provision of custodial care alone is rationally related to the legitimate state interest of providing food, shelter, supervision and care to those citizens who are unable to survive on their own. In addition, the requirement that the care provided be the "least intrusive" alternative marks an unwarranted extension of less drastic means analysis which has historically been limited to statutory enactments interfering with fundamental rights, primarily freedom of speech. Finally, the states acknowledge that they have a responsibility to protect their clients from harm and that excessive and inappropriate use of physical restraints may constitute violations of their clients' residual liberty interests; however, the standards adopted by the Court below create what amounts to strict liability for those who provide services to the retarded and unduly restricts professional judgment.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT THE RESPONDENT HAD A CONSTITUTIONAL RIGHT TO "ADEQUATE" TREATMENT.

a. The Court below repeatedly relies on findings of the nature of mental retardation that were made by the District Court and adopted by the Court below in *Halderman* v. *Pennhurst State School, supra.* Unfortunately, the *Halderman* Court made "findings" concerning the nature of mental retardation which are untrue and accepted a treatment methodology which is subject to considerable dispute.

Space limitations prevent the *amici* states from providing this Court with an understanding of the mentally retarded population in state mental retardation facilities. For an excellent summation, however, see the Amici Curiae Brief of the Congress of Advocates for the Retarded, Inc., et al, to this Court in *Pennhurst State School* v. *Halderman,* Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489 (U.S.).

Two examples of the lower Court's erroneous understanding of the institutionalized population will be offered. First is the adoption of the District Court's finding in *Halderman* that the mentally retarded residents "...are not...a danger to others..." Pet. App. 13a, n. 18. This finding, however, is patently inconsistent with the finding of the Court below that the respondent was injured on over seventy occasions as a result of self-inflicted injuries *and* "...the result of attacks by other residents, some in retaliation against Romeo's aggressive behavior." Pet. App. 5a. The professional literature is in accord in that a percentage of the population of state facilities is highly aggressive/assaultive and the leading cause of failure in community living arrangements and reinstitutionalization is aggressive/assaultive behavior. Eyman, *et al., Trends in Maladaptive Behavior of Mentally Retarded Persons Placed in Community and Institutional Settings,* 85 Am.

J. of Mental Deficiency 473 (1981); Schalock, *et al., Community Integration of Mentally Retarded Adults: Community Placement and Program Success,* 85 Am. J. of Mental Deficiency 478 (1981); Sutter, *et al., Comparison of Successful and Unsuccessful Community Placed Mentally Retarded Persons,* 85 Am. J. of Mental Deficiency 262 (1980); Pagel *et al., Readmissions to a State Hospital for Mentally Retarded Persons: Reasons for Community Placement Failure,* 16 Mental Retardation, No. 2, 164 (1978).

Secondly, the Court asserted that "...mental retardation professionals have relegated the use of physical restraints to the closets of an earlier age." Pet. App. 18a. In fact, restraints are used both to protect clients and as part of behavior modification programs and their use in Title XIX ICF/MR facilities is governed by federal regulations that are inconsistent with the standards adopted below. (Discussed *infra*).

b. Fortified by an erroneous understanding of the nature of the institutionalized mentally retarded, the Court below proceeded to find a constitutional right to treatment in the least intrusive manner. At Pet. App. 12a, the Court states the three grounds that have been identified as legitimate justifications for a state deprivation of liberty (protection of society from dangerous individuals, protection of individuals who are unable to care for themselves, and treatment). The Court dismisses protection of society as a legitimate concern, since "(n)oticeably lacking...to the mentally retarded, are the traditional deterrence and retribution underpinnings of the criminal system," and since "...the state has no right to punish an innocent individual..." Pet. App. 12a. The Court then proceeds to declare that:

> In seeking to explain claimed infringements of fundamental liberty interests, the State is *limited to protection and treatment rationales* of a compelling or substantial nature. *Involuntary commitment in the civil context, then, quite clearly implicates a*

> *constitutional right to treatment and protection.* Pet. App. 13a. (emphasis added)

In accord, at Pet. App. 28a, the Court asserts that

> The right to treatment — or habilitation in the case of the mentally retarded — arises when an individual is involuntarily committed, *regardless of whether parens patriae or police power grounds provide the major premise for the confinement.* (emphasis added)

Although the *Romeo* decision did not discuss the case law in finding a constitutional right to treatment, its reasoning closely parallels the reasoning of the various lower courts that have found a constitutional right to treatment.[10] Invariably, all of the recent cases[11] finding a right to treatment

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[10]Lower Courts that have refused to find a constitutional right to treatment include *New York State Ass'n for Retarded Children, Inc.* v. *Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 173) (constitutional rights of residents in a state mental retardation facility rest on a right to be protected from harm and not on a right to treatment or habilitation); *Patton* v. *Dumpson*, 425 F. Supp. 621 (S.D. N.Y. 1977). See also *O'Connor* v. *Donaldson*, 422 U.S. 563, 573 (Burger, C.J.) (concurring opinion).

[11]The earlier theoretical basis for a right to treatment was based on a *quid pro quo* theory that treatment was required to compensate the civilly committed for the absence of procedural safequards that are afforded to criminal defendants. *Wyatt* v. *Stickney*, 325 F.Supp. 781, 784 (M.D. Ala. 1972); *Covington* v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969). That theory has largely been abandoned due to the strengthening of state civil commitment statutes and the recognition that the theory is unsound for the reasons state in Chief Justice Burger's concurring opinion in*O'Connor* v. *Donaldson, supra.* See Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978); Ferleger, *et al., Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 Stan. L. Rev. 717, 734 (1979).

start with one sentence, taken out of context, from *Jackson* v. *Indiana, supra,* 738 (1972) namely that "(a)t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." From there it is asserted, without support, that the purpose of commitment is treatment; wherefore, it is concluded, treatment must be provided. See for example, *Halderman* v. *Pennhurst State School,* 444 F.Supp. 1295, 1315, 1316 (1977); *Wyatt* v. *Aderholt,* 503 F.2d 1305, 1312 (5th Cir. 1974); *Donaldson* v. *O'Connor,* 493 F.2d 507, 521 (5th Cir. 1974) *rev. and remanded* 422 U.S. 563 (1975); Ferleger, *et al., Anti-Institutionalization: The Promise of the Pennhurst Cast, supra,* 733-739.

c. The Court below, Pet. App. 10a-12a, assumes that when there is a civil commitment, there is also a state denial of liberty and a corresponding duty on the state to provide treatment.[12] In concluding that there has been a state denial

[12]It is clearly established that the states are under no constitutional obligation to provide governmental services. *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *San Antonio Indepedent School District* v. *Rodriquez,* 411 U.S. 1 (1973); All of the cases that have found a constitutional right to treatment, therefore, are based on a finding of a state deprivation of liberty.

> The right of any individual to treatment exists only by reason of, and is wholly dependent on, derived from and concomitant with a deprivation by the state of the individual's Fourteenth Amendment liberty right for the purpose of treatment. *Rone* v. *Fireman,* 473 F.Supp. 92, 119 (N.D. Ohio 1979)

Some courts have assumed that all voluntary admissions are in a state facility involuntarily due to the failure of the state to create alternatives and, therefore, find that the voluntary admissions are also entitled to treatment. *Halderman* v. *Pennhurst State School,* 446 F.Supp. 1295, 1319 (1977); *Wyatt* v. *Stickney,* 344 F.Supp. 387, 390, n. 5 (1972). That approach universally puts the burden of the retarded citizens' condition on the states should the states voluntarily render services and ignore the fact that the states are under no constitutional obligation to create alternative services.

of liberty, the *amici* states maintain that the Court below failed to understand the role of the states in providing services to their citizens.

The primary role of the state is to provide necessary mental retardation services to the extent that the states are willing to expend the necessary resources. Typically, a wide variety of services are offered, including evaluation and testing, early intervention, counseling, respite care, day care, etc. Frequently, however, a family can no longer cope with the demand of a retarded family member and a state is requested to provide residential services.

In practice, the manner of admission into a state residential facility (whether committed or not) depends on whether the client is a minor and, if of legal age, whether a legal guardian has been appointed. Generally speaking, if the client is a minor, *Parham* v. *J.R., supra,* or if a legal guardian has been appointed, the client is voluntarily admitted into the facility. Clients are civilly committed by a parent or relative when the client is of legal age and a guardian has not been appointed.

The facts indicate that the respondent's mother was the petitioner in the commitment proceeding. Pet. App. 5a. Furthermore, the facts indicate that the respondent's mother and legal representatives have not requested that he be "freed";[13] instead, they take issue with the services that have been provided in the institution. Pet. App. 3a-7a.

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[13]By comparison, see *O'Connor* v. *Donaldson*, 422 U.S. at 565, 574, 575, which did not concern the validity of the initial commitment, which was initiated by Donaldson's father, but dealt with the repeated refusal of the superintendent of the facility to release him even though Donaldson was not dangerous to himself or others and was not receiving treatment.

The passage of a civil commitment statute and the creation of a Probate Court System did not deprive the respondent of his liberty or compel his mother to seek the commitment. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978). Pennsylvania apparently did no more than it would have done if the respondent were a voluntary applicant for admission. Specifically, the State reviewed his case before admission to ensure that he was retarded and that he was an appropriate candidate for the facility.

Where the states do not initiate the commitment proceeding,[14] or do not refuse to release the client on request, the *amici* states fail to see how they deprive their citizens of liberty when they provide necessary services at the request of a family member.[15] The *amici* states further fail to see any meaningful basis for distinguishing between the duties that are owed to their institutionalized clients based on admission status, when the client's status (committed or not) depends

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[14]The various commitment statutes frequently authorize a state official to petition for commitment or authorize commitment as an alternative to an adjudication on a criminal charge. Those situations are distinguishable from the more typical case at hand since the state is involved in the initial deprivation of liberty.

[15]Indeed, but for the willingness of the states to provide services life itself would be threatened.

> Even as to those residents under the age of 18, the district court found that Pennhurst "was and is their only alternative," *id.* at 1311 (footnote omitted), and that "they are acting as the residents' only source of food, shelter, supervision, and medical care. Far from being "trivial", these services are a matter of life or death to the residents. *Halderman* v. *Pennhurst State School*, 612 F.2d 84, 125 (3rd Cir. 1979) (Seitz, C.J.) (dissenting opinion).

on arbitrary factors such as age and/or the existence of a legal guardian.[16]

d. If this Court finds that the respondent has been subject to a state deprivation of liberty, the *amici* states do not take issue with the proposition that the nature of "confinement" must bear a reasonable relationship to a legitimate state interest. The *amici* maintain, however, that it does not necessarily follow that treatment is constitutionally required. In particular, the *amici* maintain that *Jackson* v. *Indiana* does not compel the conclusion that treatment must be provided.

Jackson involved a claim by an individual who was committed pursuant to an Indiana statute that allowed for an indefinite commitment of a criminal defendant who was found to be incompetent to stand trial. This Court held that the statutory procedure employed violated due process because *the statute* was not sufficiently tailored to implement the valid state purpose of depriving incompetent criminal defendants of their liberty pending trial. In context, the sentence requiring that, "...the nature and duration of commitment bear some reasonable relation to the purpose of which the individual is committed," is solely concerned with the validity of the statutory enactment which authorized a depri-

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[16]The *amici* states do not question that state commitment statutes are subject to constitutional review to ensure that the citizenry may only be committed for legitimate reasons and to ensure procedural safeguards. See, *Addington* v. *Texas*, *supra*; *Jackson* v. *Indiana*, *supra*; *Humphrey* v. *Cady*, 405 U.S. 504 (1972). The *amici* states, however, fail to see how there is a state denial of liberty, which alledgedly raises an obligation on the states to provide habilitative services, when the respondent's mother petitioned for the commitment (pursuant to a state statute which is not subject to constitutional attack) and when the respondent's representatives have never requested that he be freed. Although a number of lower courts have assumed that there is a state deprivation whenever there is a civil commitment, that conclusion is not necessarily supported by the prior decisions of this Court.

vation of liberty and was not intended to circumscribe the conditions of confinement.[17] Indeed, throughout the opinion it is clear that Jackson could have been committed by one of the alternative statutory procedures which were sufficiently tailored to implement a valid state interest, *even though no treatment was available for Jackson's condition.* 406 U.S. at 719, 727.

In *O'Connor* v. *Donaldson, supra,* this Court reviewed a decision which held that, regardless of the basis for the civil commitment, a person confined against his will in a state institution has "a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." 493 F.2d at 520.

This Court was able to avoid the constitutional right to treatment claim based on the recognition by this Court that *none* of the grounds for involuntarily confining such a person were present.

> We need not decide whether, when, or by what procedures a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person — to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness. For the jury found that *none of the above grounds for continued confinement was present* in Donaldson's

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[17] *Jackson* also indicated that a state cannot retain a resident when it no longer has a legitimate reason for detaining the client. 406 U.S. at 729. See also *O'Connor* v. *Donaldson, supra,* at 574, 575.

case. 422 U.S. at 573, 574. (emphasis added) (citations deleted).

This Court must now decide whether an "involuntarily confined" mentally retarded citizen has a constitutional right to habilitative services when he has been dangerous to others and is also unable to care for himself.

As indicated by Chief Justice Burger in *O'Connor* v. *Donaldson, supra,* at 581 (concurring opinion), the claim that the State has no power to confine the mentally disabled except for the purpose of providing treatment "...is surely not descriptive of the power traditionally exercised by the States in this area."

Historically, the retarded were generally neglected before 1850. Best, PUBLIC PROVISION FOR THE MENTALLY RETARDED IN THE UNITED STATES (1965). To the extent that the retarded were to be found in public residential facilities before the middle of the nineteenth century, they were found in alms houses, jails and insane asylums. Baumeister, *The American Residential Institution: Its History and Character* in Residential Facilities for the Mentally Retarded, 4, 5 (Baumeister and Butterfield, ed 1970). The earliest public facilities for the retarded were established in approximately 1850 as "schools" for the purpose of educating the retarded and returning them to society. *Id.* at 6, 7. By 1875, however, there was a reaction against the early claims of success that proved to be ill-founded and a trend began toward construction of more and larger institutions limited to providing custodial care and to protecting society. *Id.* at 9, 10. The twin purposes of custody and protection of society continued until very recent years when the "developmental model" for providing services to the retarded gained ascendancy. Roos, *Custodial*

Care for the "Subtrainable" — Revisiting an Old Myth, 5 Law and Psych. Rev. 1 (1979).[18]

In addition to the historical provision of custodial care, the accepted bases of the civil commitment power have traditionally included the police power to protect the community from those who are dangerous because of a mental disability and the *parens patriae* power to protect those who are unable to care for themselves.

> The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. *Addington* v. *Texas, supra,* p. 426 (1978).

See also, *Jackson* v. *Indiana, supra; Humphrey* v. *Cady, supra.*

The error of the Court below, therefore, is that it failed to recognize that the provision of care and custody validly implements the legitimate state purpose of protecting its citizens who are unable to care for themselves.

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[18]The developmental model assumes that "...each retarded person should be approached with the positive expectation that he can learn, grow and develop." Roos, *Custodial Care for the "Subtrainable"-Revisiting an Old Myth*, supra, p. 3. *Some* residents, however, have not benefited from exhaustive training efforts.

> To continue "training" without progress is to misuse resources and may even constitute abuse of a helpless person. Among the individuals now remaining in institutions are many who are not likely to profit *significantly* from formal training. Ellis, *The Partlow Case: A Reply to Dr. Roos, supra, p. 28.*

> I believe that the residents' inability to live independently distinguishes this case from *Donaldson* and other cases granting non-dangerous mental patients a right to treatment. Moreover, I believe that the state's willingness to provide the residents with such necessities as food, shelter, medical care, and supervision, for which the residents' have no other source, forms an adequate basis for some state-imposed restrictions on their liberty.[19] *Halderman* v. *Pennhurst State School,* 612 F.2d 84, 12, (C.J. Seitz) (dissenting opinion).

See also, *O'Connor* v. *Donaldson, supra,* p. 573 (Burger, J.) (concurring opinion).

In short, the *amici* maintain that the conditions of "confinement" bear a reasonable relation to a legitimate state interest when the states, pursuant to their *parens partiae* powers, provide care and custody to their citizenry who are

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[19] *The amici* states fail to understand how Chief Justice Seitz could hold in *Halderman, supra,* p. 125-127, that the provision of custodial care alone is constitutional when the resident is unable to care for himself but hold in the case below that "...the plaintiff has a constitutional right to minimally adequate care *and* treatment..." Pet. App. 54a. The *amici* maintain that Chief Judge Seitz committed the same leap in reasoning as the majority in that he first recognized that the provision of care and custody justifies a deprivation of liberty, Pet. App. 53a, but then concludes that there is a constitutional right to treatment without explaining why the provision of care and custody alone is unconstitutional. Indeed, he cites the same cases in support of his conslusion in *Romeo* that there is a constitutional right to treatment, Pet. App. 54a, that he distinguished in *Halderman*, 612 F.2d at 125, as not applying to the retarded because of the inability of the profound/severly retarded to survive on their own.

unable to survive on their own.[20] Although the states have a legitimate interest in providing habilitation in addition to care and custody, as long as care and custody are provided, the conditions of confinement are constitutional.[21]

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[20] It is not necessary for this Court to rule whether a state may commit, pursuant to its *police power*, based on a finding of mental retardation and danger to others, and provide only custodial care. The respondent was typical of the overwhelming majority of the "behavior problems" in state facilities for the retarded in that he was both "dangerous to others" and "in need of care and custody". This Court, therefore, need not address the concern of the Court below, Pet. App. 12a, that treatment is required to prevent an individual from being "punished" by indefinite "incarceration" when he has not been convicted of a crime since that concern is only present when the state acts pursuant to its police powers.

[21] The Court below looked to state law to discern that a "purpose" of commitment is the provision of treatment.

> In the present case *Romeo* was confined pursuant to §406 of the Pennsylvania Mental Health & Mental Retardation Act of 1966, which provides that commitment is for "care and treatment'. By basing *Romeo's* deprivation of liberty *at least partially* upon a promise of treatment, the state ineluctably has committed the community's resources to providing minimal treatment. Pet. App. 34a, 35a.

Given the variation between the states in the extent that services for the retarded have been funded and entitlements created for habilitative services, the *amici* states maintain that it is inappropriate for *constitutional* obligations to vary depending on the vagaries of state law. If the respondent had a right to treatment under Pennsylvania law, due process is satisfied if a state remedy is available to him to vindicate that right. *Parratt* v. *Taylor*, 49 U.S.L.W. 4509, 4512 (May 19, 1981). Furthermore, it is inappropriate for a Court to define a constitutional standard of minimally adequate care which goes beyond a state created entitlement to care, when the constitutional right to treatment is based on the state entitlement.

e. If this Court finds that there is a constitutional right to treatment, the standard that the treatment must be "adequate" is of very little assistance to the states. The fundamental question is whether, and to what extent, the states must commit resources to provide habilitative services for the institutionalized retarded. Mental retardation is not an illness to be treated by generally accepted medical practice (an "adequacy" standard), but is rather a condition of diminished cognitive capacity and adaptive behavior which may be subject to some improvement through the application of habilitative services. Until a standard is clearly defined, it is impossible to say whether or not a particular plan of habilitative services is "adequate" or not.

This Court in *O'Connor* v. *Donaldson* indicated that a Court is competent to determine that *no* treatment was provided. 422 U.S. at 573. It does not necessarily follow, however, that a Court is competent to promulgate standards of adequate care. Compare the standards for constitutionally adequate care set forth in *Rone* v. *Fireman, supra,* p. 120, with the standards of *Gary W.* v. *State of Louisiana,* 437 F.Supp. 1209, 1225 (E.D. La. 1976). Also, see the much cited decision of *Wyatt* v. *Stickney,* 344 F.Supp. 387, 395-407 (1972) where the Court detailed a set of *"minimum* constitutional standards for adequate habilitation of the mentally retarded," which governed every facet of the institution from the definition of a "qualified mental retardation professional" to when a body organ could be removed for the purpose of transplantation. It should be of interest to this Court to note that Dr. Alfred A. Baumeister[22] has written the fol-

[22]Dr. Baumeister was Professor of Psychology and Director of the University of Alabama Center for Developmental and Learning Disorders at the time of the original *Wyatt* litigation which he participated in as a witness for the plaintiffs'. He is a Past-President of the American Association of Mental Deficiency and his many publications include being the co-editor (and contributor) of the leading text on residential facilities for the mentally retarded. Residential Facilities for the Mentally Retarded (1970). (Baumeister and Butterfield, eds.)

lowing of the *Wyatt* standards:

> Although the *Standards* are those of the Court and compliance is mandated by the Court, in actuality they were prepared by lawyers for the plaintiffs and amici with the considerable assistance of mental retardation "experts." The Standards were stipulated by the State without any significant change and certainly without resistance....The "experts" who participated in the development of these Standards were not necessarily representative of the various interested professions. To my knowledge no professional organization undertook to make recommendations concerning these Standards in any formal or systematic sense....One thing is certain, however — most of these criteria cannot be justified on the basis of empirical research that existed at the time or that exists now. Baumeister, *The Right to Habilitation: What Does it Mean? supra,* p. 63.

II. THE COURT BELOW ERRED IN HOLDING THAT THE CONSTITUTION PLACES SUBSTANTIVE LIMITATIONS ON TREATMENT ALTERNATIVES BY REQUIRING THE TREATMENT PROVIDED TO BE THE "LEAST INTRUSIVE" ALTERNATIVE.

a. In addition to finding a constitutional right to "adequate" treatment, the Court below found that when a mode of treatment impinges on a protected liberty interest, the treatment must be the least intrusive available under the circumstances in order to be constitutional.[23]

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[23]The Court also singled out one accepted form of treatment, the use of restraints ("shackling"), and concluded that restraints may only be utilized if they are the "...least restrictive method of dealing with the patient." Pet. App. 18a. Discussed, *infra.*

As the basis of its holding that the mentally retarded have a right to the least intrusive treatment, the Court below cited the "...existence of a judicially assessable, discrete act, which entails a significant loss of individual liberty...." Pet. App. 30a. Although not discussed below, the Third Circuit must also have assumed judicial competence to identify alternative modes of treatment (or treatment settings) as being both "adequate" and "less restrictive."

The danger of this part of the decision below is that it declares otherwise appropriate treatment to be unconstitutional as a matter of substantive due process if "less intrusive" treatment is available, even though the "more intrusive" treatment may offer a greater likelihood of success.[24] For example, the Court below strongly suggests that the administration of psychotropic medication is an invasion of protected liberty interests which may only be justified if the treatment is the "least intrusive alternative." Pet. App. 30a-31a, 76-78a. Psychotropic medications, however, are recognized as being medically indicated for the retarded when target symptoms, such as persistent hyperactivity, combativeness, and self-mutilation are present. Lipman, *et al., Psychotropic Drugs and Mentally Retarded Children* in PSYCHOPHARMACOLOGY: A GENERATION OF PROGRESS (Lipton, DiMascio and Killam, eds. 1978); Lipton, *et al., The Role of Drugs in the Prevention and Treatment of Mental Retardation* in RESEARCH TO PRACTICE IN MENTAL RETARDATION, Vol. III (Miller, ed., 1977).

Moreover, the standard of "least intrusiveness" is unworkable due to the inability of the Court (as well as the professional and direct care staff) to identify with certainty which generally accepted treatment methodology impinges on pro-

[24]Any procedural safeguards which the state may provide before employing the challenged mode of treatment are irrelevant under the analysis of the Court below since, as a matter of substantive due process, only the least instrusive treatment is acceptable.

tected liberty interests and which treatment methodology is "least intrusive."

> Treatment programs, for example, could be governed by more than one standard. Testimony at the trial indicated that some behavior modification programs utilize "timeout" principles involving periodic mechanical restraints of the limbs to eliminate aggressive behavior. It is not clear whether such a program has to be the least intrusive alternative or only be acceptable in light of present medical or other scientific knowledge.[25] Pet. App. 51a, 52a (Seitz, C.J.) (Concurring Opinion).

b. As the Court below acknowledged, Pet. App. 32a, n. 46, "less restrictive" analysis has generally been limited to *statutory enactments* which interfere with fundamental

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[25]When dealing with an aggressive/assaultive or self-abusive client, the treatment choices include behavior modification programs and/or psychotropic medications. Given that behavior modification programs frequently include such restrictive practices as the periodic use of restraints and that behavior modification frequently extends over a long period of time and are of uncertain success, it is not clear which treatment choice is "less intrusive."

Moreover, the standards adopted by the Court below forbids the states from restraining an aggressive/assaultive or self-abusive client unless the use of restraints is the "least restrictive means of handling the resident," Pet. App. 46a, (even though restraints are frequently part of behavior modification programs) but also require the states to protect their clients from harm absent "substantial reasons." Given the existence of a substantial number of aggressive clients, it will be impossible for the various professional and direct care staff to comply with the inconsistent obligations created by the Court below. Woods, *et al., Conflict of Rights: Implications for Mental Patients' Right to Adequate Protection in Light of the Right to Least Restrictive Treatment,* 4 Law and Psych. Rev. 191 (1978).

rights, primarily freedom of speech. See *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

Even as applied to statutory enactments affecting fundamental rights, however, the concept has been cautiously applied.

> And for me, "less drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation and thereby enable himself to vote to strike legislation down. *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J.) (Concurring opinion).

See also, Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 472 (1969).

Even though the Court below was aware of the historic limitations on less drastic means analysis, the Court below imposed an affirmative obligation on the states to treat their institutionalized clients in the "least intrusive" manner. It did so even though this Court may have already ruled that there is no constitutional right to treatment in the least restrictive setting. *State* v. *Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969), *dismissed for want of a substantial federal question*, 396 U.S. 276 (1970).

The lower courts have varied considerably on the issue of whether the retarded have a right to be treated in the "least

restrictive setting."[26] One Court has held that the retarded have a constitutional right to be treated "...in the least restrictive setting consistent with that individual's habilitative need," that the states have a constitutional duty "...to explore and provide the least stringent practical alternatives to confinement of retarded individuals" and that an institution is never the least restrictive setting. *Halderman* v. *Pennhurst State School,* 446 F.Supp. at 1319, 1320. Another Court has held that there is a right to treatment in the least restrictive setting and that the states have a duty to "...provide community facilities and services when an individual's habilitation demands such treatment, (but that does)...not remove from the professional judgment of qualified staff members the decisions regarding the appropriateness of community placement." *Wyatt* v. *Ireland,* No. 3195-N (M.D. Ala. March 21, 1980) p. 7.

From the evidence it is clear that there is a debate within the profession concerning the beneficial effects of community placement for the severely and

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[26]A finding of restictiveness should require an analysis of the effect of the residential placement on the client's ability to leave the confines of the residential unit and to experience the environment, the client's ability to participate in gainful employment or some other regular, meaningful activity, the client's ability to recreate and to socialize with others, etc. None of the courts that have found a right to "least restrictive environment" have analyzed these factors but have simplistically assumed that community living arrangements are intrinsically "less restrictive" of liberty than institutitons. See generally, the Amici Curiae Brief of the Congress of Advocates for the Retarded, Inc., *et al.*. in *Pennhurst State School* v. *Halderman*, No. 79-1404, 79-1408, 79-1415, 79-1489 (U.S. S.Ct.) P. 6-15

Furthermore, the *amici* states fail to comprehend why considerations of comparative restrictiveness foreclose consideration of other legitimate concerns, such as the ability to protect the client from harm.

> profoundly retarded. The Court will not choose sides in this debate. Nor should it...Determining the ideal mode of treatment or ordering state institutions to implement the best system, is beyond the province of the Court. *Id.*

Finally, another Court has held that:

> As long as treatment within the hospital environment does not *by comparison unduly burden* the individual's liberty interest, the Court cannot find that the Constitution requires the provision of treatment in alternate settings. *Rone* v. *Fireman, supra,* p. 125 (emphasis added).

The *amici* states maintain that this Court should unequivocally reject "least restrictive" analysis as a substantive, constitutional limitation on the care and treatment of the mentally retarded. As noted *supra,* the concept of less drastic means has traditionally been limited to the review of statutory enactments interfering with fundamental rights and cannot be consistently applied to the care and treatment of the retarded.

> (W)hat is the least restrictive environment for any particular individual is primarily a medical question. As the record demonstrates, this concept is an uncertain one and has been subject of fervent medical debate. I feel it inappropriate for courts to make such a judgment on the basis of a doctrine that contemplates an objective, single better alternative. *Halderman* v. *Pennhurst State School,* 612 F.2d at 128. (Seitz, C.J.) (dissenting opinion).

See also Richardson, *Freedom of Expression and the Function of the Courts,* 65 Harv. L. Rev. 1, 40 (1950); Tribe, American Constitutional Law 722-23 (1978).

Furthermore, the application of "least restrictive alternative" analysis to the provision of care and treatment ignores the distinction between unwarranted government interference with protected liberty interests and the affirmative creation of an entitlement to alternative government services. *Harris* v. *McRae*, 100 S. Ct. 2671 (1980).

Finally, it is suggested that the correct standard is whether the care provided is reasonably related to *a* state interest that is sufficient to justify "confinement." The standard proposed by the *amici* states is close to the one identified by Chief Judge Seitz in his dissenting opinion in *Halderman*, 612 F.2d at 129, in that Chief Judge Seitz employs a rational relationship test and acknowledges that "(a) large scale institution is quite capable of providing its residents with adequate food, shelter, medical care and other necessities." *Id.* Instead of looking to "*the* purpose of confinement," *Id.*, however, the *amici* states suggest that the correct *constitutional* standard is whether the conditions of confinement are rationally related to *a* legitimate state interest. Where *state law* limits the purpose of confinement to the provision of treatment, due process is satisfied if there is a remedy available to vindicate the *state created* entitlement. See n. 21, *supra* p. 20.

III. THE STANDARDS ENUNCIATED BY THE COURT BELOW WITH RESPECT TO THE USE OF RESTRAINTS AND PROTECTION FROM HARM CREATE WHAT AMOUNTS TO STRICT LIABILITY FOR THOSE WHO PROVIDE SERVICES TO THE MENTALLY RETARDED WHICH IS NEITHER REQUIRED BY THE CONSTITUTION NOR DESIRABLE AS A RESTRICTION ON PROFESSIONAL JUDGMENT REGARDING SUITABLE CARE.

It follows from the argument advanced *supra* that the provision of care and custody requires the states to take reasonable steps to protect their clients from harm. The *amici* states

also acknowledge that their clients have residual liberty interests that might be violated by excessive and inappropriate use of restraints which go beyond what would reasonably be anticipated at the time of the initial commitment. The question becomes, what standard should the states be held to?

The new constitutional rights created by the Third Circuit Court of Appeals would require all of those involved in the care of the mentally retarded to demonstrate "compelling necessity" and "least restrictive alternative" in the use of restraints, and "substantial necessity" as a justification for failing to prevent harm to a particular patient.

As authority for its "compelling necessity" and "least restrictive alternative" tests as applied to the use of restraints, the Court below cited *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Neither of those cases support the compelling necessity or least restrictive alternative tests enunciated in this case.[27] See *Bell* v. *Wolfish*, 441 U.S. 520, n. 14 (1979). With respect to its "substantial necessity" standard as applied to protection from harm, the Court below cited no authority for its use of this test.

In *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976) this Court held that "...the deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' " proscribed by the Eighth Amendment. While the Eighth Amendment's prohibition against "cruel and unusual punishment" may not be applicable to

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[27] *Shapiro* v. *Thompson* involved an equal protection challenge to state welfare residency requirements found to violate the constitutional right to travel. *Sherbert* v. *Verner* held that a denial of unemployment benefits to one who refused to work on Saturdays because of religious beliefs constituted an infringement of First Amendment rights.

patients of a state facility for the mentally retarded because its strictures are limited solely to sentenced prisoners, *Ingraham* v. *Wright*, 430 U.S. 651 (1977), the standard of care enunciated in *Estelle* v. *Gamble*, *supra*, could apply with equal force to alleged deprivation of rights under the Due Process Clause of the Fourteenth Amendment. However, once the Court below determined that this case was governed by the Fourteenth Amendment as opposed to the Eighth Amendment, it totally rejected the "deliberate indifference to serious medical needs" standard of *Estelle* v. *Gamble*, *supra*, and announced a series of rigid constitutional rights extending far beyond those considered, let alone recognized, by any other court.

Other courts, when faced with similar issues involving patients in facilities for the mentally ill, have chosen to adopt terminology consistent with the standard of deliberate indifference.

> If plaintiff can establish at trial a sufficient helplessness on the part of Rachel and a deliberate indifference toward Rachel's medical needs, including protection from assault, on the part of those caring for her, then plaintiff will have proved that she was denied her constitutional right to a humane and safe living environment while confined under state authority. *Goodman* v. *Parwatiker*, 570 F.2d 801, 804 (8th Cir. 1978).

Similarly, *Harper* v. *Cserr*, 544 F.2d 1121, 1124 (1st Cir. 1976), held that a sufficient combination of helplessness on the part of the decedent and "wanton callousness" on the part of those caring for her, might cross the line from a tort to a §1983 case under either the Eighth or Fourteenth Amendments.

While the terminology may differ slightly from "deliberate indifference" to "wanton callousness," the above-cited cases

recognize that negligence or malpractice alone does not reach the dimensions of a constitutional violation such as would afford relief under §1983 whether the analysis proceeds under the Eighth or Fourteenth Amendments. To hold otherwise, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976); *Parratt* v. *Taylor*, 49 U.S.L.W. 4509, 4513 (U.S. May 18, 1981).[28]

The Court below acted under the mistaken belief that restraints and personal protection involved "undiluted legal concerns" unrelated in any way to the exercise of medical judgment. Also, the Court equated shackling with punitive sanction. Pet. App. 14a. Decisions regarding restraints and protection from other residents are frequently an integral part of a treatment program. See Rosen, *et al.*, *The Role of Physical Restraints in the Treatment of Psychiatric Illness*, 39 J. Clin. Psychiat. 228 (1978); Burstein, *Using Mechanical Restraints on Acutely Disturbed Psychiatric Patients*, 26 Hosp. & Comm. Psychiat. 757 (1975). Federal regulations recognize the use of physical restraints in behavior modification programs and as a means of protection. 42 C.F.R. §442.438. The regulations do not refer to properly used

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[28] In *Parratt* v. *Taylor*, *supra*, this Court held that the negligence of prison employees which resulted in the loss of a prisoner's hobby materials valued at $23.50 constituted a deprivation of property under color of state law. However, since the victim was entitled to a post-deprivation remedy under state law, it was held that the remedies were sufficient to satisfy the requirements of procedural due process. 49 U.S.L.W. at 4513. In this regard, it is important to emphasize that the issues involved in the present case are not procedural but substantive. As noted by Justice Powell in his concurring opinion, 49 U.S.L.W. at 4515, the substantive limitations on state actions imposed by the Due Process Clause "...may extend to *intentional* and *malicious* deprivations of liberty and property..." (emphasis added). The Third Circuit has chosen to impose substantive limitations far beyond any previously comprehended.

restraints as presumptively punitive nor do they require an otherwise appropriate use of restraints to be the least restrictive alternative available. While the Court below was concerned primarily with shackling, other forms of restraint might include soft restraints of the hands and legs, muff restraints of the hands, isolation, or a variety of medications. Decisions regarding the need for any of these forms of restraints, the circumstances under which they will be used, and the duration of their use involve an understanding of the medical and psychological history of the patient, his current circumstances, and the objectives of any program of which the particular restraint may be a component. It is not appropriate to refer to these difficult decisions as undiluted legal concerns nor is it helpful to characterize a recognized form of treatment and protection as punitive in nature. Should abuses occur which ignore accepted professional judgment and result in punitive actions on the part of professionals and staff, then §1983 would afford the victim relief under standards far less rigid than those established by the Third Circuit.

Liability in a state negligence or malpractice action would normally be found to exist where a patient could show that the care or treatment in question was an unjustified departure from established medical standards. While this Court has frequently cautioned against the creation of constitutional torts, the multitudinal standards created by the Third Circuit has caused a substantial shift of the burden of proof to the defendants thereby creating a form of constitutional strict liability. Given the ease with which professional judgments could be invalidated under the holding of the Third Circuit, it is almost assured that the federal courts will be regularly called upon to review individual programs for the care or treatment of the mentally retarded.

Under these conditions, it is not unlikely that many dedicated and experienced employees would feel compelled to seek employment elsewhere. For those who chose to remain to serve the mentally retarded, mentally ill or others in need

of special care provided by the states, the pressures and confusions engendered by these standards may well result in a retrenchment of programming and an overly-cautious approach to care and treatment which will not necessarily promote the best interests of the individuals being served.

CONCLUSION

The decision of the Court below should be reversed.

Respectfully Submitted,

THE STATES OF CONNECTICUT, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, VIRGINIA, WASHINGTON AND WEST VIRGINIA

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MOTION FILED
SEP 25 1981

NO. 80-1429

IN THE

SUPREME COURT OF THE UNITED STATES

October term 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF MENTAL HEALTH ADVOCACY SERVICES AND MENTAL HEALTH ASSOCIATION IN LOS ANGELES

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Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT

Applicants ask leave of court to file an Amici Curiae Brief in support of Nicholas Romeo.

a. Interest of Amici Curiae.

Amicus Curiae Mental Health Association in Los Angeles is a non-profit

corporation of 1400 citizens concerned with the plight of the mentally ill. Among its members are prople who have recovered, as well as people who are presently suffering, from mental illness. In many circumstances Developmentally Disabled people also are mentally disabled. Amicus Curiae is, therefore, involved in both areas. The Mental Health Association has actively advocated and litigated in representing its members and their concerns. Among the issues litigated is a claim of right to treatment in the least intrusive manner based upon California state statutes (the Lanterman-Petris-Short Act which requires such treatment), the U.S. Constitution and the California Constitution.

Amicus Curiae Mental Health Advocacy Services is a non-profit corporation incorporated under the laws of California and

sponsered by the Los Angeles County Bar Association, the Beverly Hills Bar Association as well as the Mental Health Association in California. The purpose of Mental Health Advocacy Services is to represent and litigate the interests of the mentally and developmentally disabled citizens of California. The organization has been in existence since 1977 solely for the purpose of providing services to the mentally ill and developmentally disabled patients.

Both Amici are intensely concerned with the issues of this case as it will impact upon their members and the people they represent.

b. Argument Presented

Amici will argue that the nature of the deprivations are so fundamental that they require a compelling state interest or substantial necessity before they can be limited. Because 42 U.S.C. § 1983 exists to allow such claims for relief, the district court appropriately assumed jurisdiction to hear these claims based upon both federal and state created due process rights.

The plaintiff was properly confined for care and treatment under the appropriate Pennsylvania statutes. He was not confined to be beaten, shackled and denied treatment. This failure to provide for protection of Mr. Romeo's liberty interests is compensable. The Third Circuit's decision should be upheld in these areas.

The defendants request for qualified immunity is not appropriately before this court. It was neither argued nor decided by the court below and should not be decided in the Supreme Court for the first time.

Respectfully submitted,

DAN STORMER
Counsel for Amici

NO. 80-1429

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v.

NICHOLAS ROMEO, an Incompetent, by his Mother and Next Friend, PAULA ROMEO,

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AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT

ARGUMENT

THE THIRD CIRCUIT COURT OF APPEALS APPROPRIATELY ORDERED A REMAND FOR TRIAL WITH A JURY INSTRUCTION ON QUALIFIED IMMUNITY.

a. The District Court has jurisdiction to hear Mr. Romeo's damage claims for constitutional deprivations.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." Marbury v. Madison, 1 Cranch. 137, 163 (1803). If a federal statute provides a general right to sue for an invasion of a protected right, federal courts may use any "available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678,

684 (1946) 42 U.S.C. §1983 provides Mr. Romeo with the vehicle for suit and the federal court with the authority to hear his claims that he was denied due process protections as guaranteed under the U.S. Constitution.[1] A state cannot limit federal authority

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1/ 42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities assured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

when legitimate constitutional claims are made. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971); In Re Neagle, 135 U.S. 1 (1889). Because 42 U.S.C. § 1983 is available "[T]he federal question . . . (becomes) . . . an independent claim both necessary and sufficient to make out . . . (a) . . . cause of action." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971).

In seeking relief a plaintiff is entitled to receive damages for constitutional deprivations because "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." Bivens v. Six Unknown Federal Narcotics Agents, supra, 403 U.S. at

395.[2/]

As will be shown, the Third Circuit rightfully found that violations of the Fourteenth Amendment were wrought upon Nicholas Romeo. A proper claim for relief in federal court is provided by 42 U.S.C. § 1983. The district court and subsequent appellate courts appropriately assumed jurisdiction.

2/ In Bivens the court set forth a list of authority for this proposition: Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536, 540 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900); J. Landynski, Search and Siezure in the Supreme Court, 28 et seq. (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution, 43 et seq. (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 8-33 (1968); cf. West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884).

b. Fourteenth Amendment due process protections attach to the method, reasons, terms and conditions of confinement.

Involuntary confinement of an individual entails a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972).

As this court said in O'Connor v. Donaldson, 422 U.S. 563, 580 (1975):

> [T]here can be no doubt that involuntary commitment to a mental hospital like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. Specht v. Patterson, 386 U.S. 605, 608 (1967).

In Vitek v. Jones, 445 U.S. 480, 487 (1980) this court stated that "[t]he loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."[3/] Because of the substantial impact that involuntary confinement for mental health reasons has upon those so confined, due process rights necessarily are implicated. Absent procedural compliance, "protected

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3/ The rights of prisoners are even more severly curtailed than the involuntarily committed because "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266 285 (1948). For the same proposition see Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974) Pell v. Procunier, 417 U.S. 817 (1974).

liberty interests would be unconstitutionally infringed." Id. at 487.[4/]

Even though state law may permit confinement of the mentally ill that, by itself, does not establish a constitutionally adequate purpose for confinement. O'Connor v. Donaldson, supra, 422 U.S. at 574. "Due process requires that the nature and duration of commitment bears some reasonable relation to the purposes for which the individual is committed." Jackson v. Indiana, 406 U.S.

4/ See also Baxstrom v. Herold, 383 U.S. 107, 113 (1966); In re Winship, 397 U.S. 358, 363 (1970); Williams v. Illinois, 399 U.S. 235, 263 (1970); Muriel v. Baltimore City Municipal Court, 407 U.S. 355, 363 (1972) upholding similar due process interests.

715, 738 (1972).

A person has a substantial liberty interest in not being confined unnecessarily for treatment. Parham v. J.R., 442 U.S. 584 (1979).

Nicholas Romeo was committed under Pa. Stat. Ann. Tit. 50, § 4406.[5/]

5/ Pa. Stat. Ann. Tit. 50 § 4406:

(a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

(b) If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and treatment. (Emphasis added.)

The statute clearly requires care and treatment. Likewise the Pennsylvania Supreme Court has required that those committed as mentally disabled must be provided care and treatment. In re Schmidt, ____ Pa. ____, 429 A.2d 631 (1981).

This state created right provides a constitutionally protectable liberty interest which is enforcible if the state does not provide such treatment. Jackson v. Indiana, supra, Paul v. Davis, 424 U.S. 693, 710 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970); Wolff v. McDonnell, 418 U.S. 539 (1974).

Due process also attaches because freedom from confinement is an "elemental liberty" Arnett v. Kennedy, 416 U.S. 134, 157 (1974).[6/] The terms and conditions of confinement must be for a legitimate purpose. O'Connor v. Donaldson, supra. A person who has not committed any crime may lose certain rights if confined as a result of mental illness or retardation; however, confinement solely for care is no different than the confinement for the status of being a narcotics addict found unconstitutional in Robinson v. California, 370 U.S. 660 (1962).

If the confinement does not provide proper care and treatment then that confined person has a due process "right to be free from, and to obtain judicial relief for, unjustified entrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977).

6/ In Speiser v. Randall, 357 U.S. 513, 525 (1958) liberty was described as "an interest transcending value."

If requested it is the obligation of the courts to view the confinement to see if constitutional terms and conditions are being met, as was done in O'Connor v. Donaldson, supra.

The protections of the Fourteenth Amendment apply to both the commitment process and the conditions of confinement once committed. Judicial relief may be sought and obtained for failures to abide by the mandates of due process.

c. Eighth Amendment.

Neither petitioner nor the respondent are contesting the Third Circuit's interpretation of Ingraham v. Wright, 430 U.S. 651 (1977) and Bell v. Wolfish, 441 U.S. 520 (1979) as precluding application of the Eighth Amendment.

d. The State cannot enfringe upon fundamental rights absent showing a compelling state interest.

Involuntary civil commitment of mentally disabled individuals in locked state institutions not only involves the obvious curtailment of freedoms of movement and travel but also massive infringement upon the First Amendment rights of free association and expression. An involuntarily committed mentally disabled individual's connections with the outside world are greatly restricted, if not severed. The individual is often subjected to treatment modalities, such as psychotropic medication, which affect thought processes and expression. Further, commitment may infringe upon the rights of marriage, procreation and voting.

The Supreme Court has found all of these rights fundamental for purposes of the due process clause and has strictly scrutinized state action which infringes these rights. See e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (marriage); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); Roe v. Wade, 410 U.S. 113 (1973)(decision to bear children); Kent v. Dullas, 357 U.S. 116 (1958); Apthekcer v. Secretary of State, 378 U.S. 500 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Bates v. Little Rock, 361 U.S. 516 (1960) (association); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (voting). This court has also recognized that constitutional rights arise because

of the severe social stigma arising from commitment for mental disability. Addington v. Texas, 441 U.S. 418, 425, 426 (1979).

When fundamental rights are infringed strict scrutiny demands that the state action be justified by a showing of compelling state interest. (See Roe v. Wade, 410 U.S. 113 (1973)). Further, even if the state can demonstrate a compelling state interest which justifies infringing the fundamental rights of involuntarily committed patients, infringements upon such rights must be carried out in the least drastic manner. The classic statement of the principle was made in Shelton v. Tucker, 364 U.S. 479, 488 (1960); even though the governmental purpose is legitimate and

substantial, that purpose cannot be pursued by means which broadly stifle fundamental personal liberties when the end can be more narrowly achieved. This principle has been part of the U.S. Supreme Court's analysis in almost every field of constitutional law, including substantive due process, Griswold v. Connecticut, supra, Roe v. Wade, supra; procedural due process, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 126, 163 (1951), the commerce clause, Dean Milk Co. v. Madison, 340 U.S. 349 (1951); and the First Amendment 'Overbreadth' cases, e.g., U.S. v. Robel, 389 U.S. (1967); Shelton v. Tucker, supra. See Bastress, The Least Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria, 27 Vand. L. Rev. 971 (1974). The principle was recently restated by

the U.S. Supreme Court in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979):

> Our previous opinions have . . . emphasized that 'even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty, Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973), and we have required that state adopt the least drastic means to achieve their ends.

That this applies in the context of civil commitment was accepted by the U.S. Supreme Court in O'Connor v. Donaldson,

422 U.S. 503, 575 (1975).[7/] The Court reasoned that "the state has a proper interest in providing care and assistance to the unfortunate" but rejected the idea that commitment for care alone was sufficient grounds because commitment is "rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own, or with the help of family or friends." There must be a greater reason for confinement than a desire to better the situation of the committed person in order for confinement to be constitutional. The confinement must further a substantial government interest. Treatment is clearly such an interest.

7/ Congress has reaffirmed this principle of full citizenship in § 504 of the Rehabilitation Act of 1973, 87 Stat. 394 as amended 29 U.S.C. § 794. Congress has also provided the United States Attorney General with the authority to bring actions on behalf of institutionalized citizens who are being subjected to conditions which "deprive such

(footnote con'd on next page)

In O'Connor this court reviewed the terms and conditions of involuntary confinement; analyzing them in light of the due process protections which apply to the institutionalized mentally disabled. It recognized that the Fourteenth Amendment applies equally to the conditions of confinement as to the process by which someone is confined.

A fundamental interest can only be limited by a compelling state interest. Even if the state has a legitimate goal ("providing care and treatment") it will be denied the power to achieve that goal by using means which unnecessarily encroach upon fundamental rights.

The actions of the officials at Pennhurst hospital do not meet these constitutional standards.

(footnote con'd from previous page)
persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States..." 42 U.S.C. 1997(a), Public Law 96-247.

e. Nicholas Romeo was Denied The Protection of the Fourteenth Amendment in Three Separate Ways.

The Court of Appeals appropriately defined Romeo's claims in traditional due process terms: 1) a right to be free from undue bodily restraint; 2) a right to personal security and protection; and 3) a right to adequate treatment. The Court found that:

> The first two are undiluted legal concerns relating to protected liberty interests, as such, they are entitled to heightened judicial scrutiny. The third entails mixed questions of law and medical judgment, and thus requires a more flexible standard of judicial review and suitable deference to informed

medical opinion. Romeo v. Youngberg, 644 F.2d 147, 159 (1980).

The court, in reviewing the due process deprivation claims applied the tri-partate balancing inquiry set forth in Mathews v. Eldridge, 424 U.S. 319, (1976).[7]

In accepting certiorari this court changed the questions somewhat;[8] however, these are also reviewable under the traditional analysis.

1) A right to be free from undue bodily restraint.

Nicholas Romeo was shackled to his bed for long hours every day for at least

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7/ "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail." Id. 424 U.S. at 334-34.

8/ Whether an institutionalized mentally retarded person has a substantive due process right,

(footnote con'd on next page)

one year. The shackling was not aimed at any treatment -- rather it was merely an administrative convenience. The record appears to be bereft of any evidence that attempts were made to use a less harsh, severe and physically damaging restraint.

Even after committment a person has a due process right to be free from unreasonable physical restraint. Parham v. J.R., 442 U.S. 584, 600-601 (1979); Ingraham v. Wright, supra, 430 U.S. at 673-674.

(footnote cont'd from previous page)

> (a) to receive treatment that is both acceptable in light of present medical or other scientific knowledge and that is least instrusive treatment available under circumstances; (b) to be free of restraints, whether for treatment or protection, absent showing of compelling necessity, and (c) to be protected from harm, however caused, absent showing of substantial necessity?

Even prisoners, who suffer the curtailment of their liberty as a valid function of punishment, (see footnote 3/) have a right to be free from unnecessary bodily restraints. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18-19 (1979). Certainly defendants would not contend that committment can be used punitively. Addington v. Texas, supra, 441 U.S. at 428, makes it very clear that punishment is not a permissible reason for confinement of the mentally disabled.

Defendants might claim that the shackling was a form of treatment; however, it looks suspiciously like the "milieu therapy" offered the plaintiff in O'Connor v. Donaldson, supra. In that case the treatment offered was the "milieu" of a mental

hospital and nothing more. Id. 422 U.S. at 569. Like the "milieu therapy" found unacceptable in O'Connor the shackling of Nicholas Romeo is nothing more than administrative convenience cloaked in the guise of the "milieu of treatment by shackling."

If the shackling was a form of punishment as part of the committment process it would be unconstitutional. Addington v. Texas, supra. If it was treatment there has to be more than a bald assertion that an obviously major encroachment on physical liberty

is treatment. O'Connor v. Donaldson, supra. Finally, if it was mere administrative convenience this violates the substantive due protections created by the Fourteenth Amendment and the requirements of care and treatment of Pennsylvania statutes.

The plaintiff's liberty interests can only be limited upon a showing of a compelling state interest. The record is empty of any substantial or compelling state interest requiring such inhumane treatment.

The Third Circuit's opinion should be upheld in this area also.

2) A right to personal security and protection.

In a four year period Nicholas Romeo suffered seventy-seven injuries. Some of these were self-inflicted; the rest were the results of attacks by others. These were the recorded injuries in a institution so beset by administrative and operational problems. One can fairly reliably infer that there were many more injuries that went unreported.[9/]

Mr. Romeo has done nothing other than to be born into this world developmentally disabled. His only crime is that he needs care and treatment. Yet defendants seem to feel that whatever you are subjected to at Pennhurst is exactly that to which you are entitled, because the state's only obligation is, seemingly,

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9/ See Pennhurst v. Halderman, 612 F.2d 84 3d Cir. (1979) for a description of the decrepit facilities at Pennhurst State Hospital.

to keep you there. This court would never allow such treatment of prisoners. Hutto v. Finney, 437 U.S. 678 (1978); Bell v. Wolfish, supra, 441 U.S. at 520; Wolff v. McDonnell, supra. The Fourteenth Amendment will simply not allow such denials of a liberty interest (personal safety). Certainly this court cannot allow such atrocities to be concealed beneath the cloak of so-called "treatment" O'Connor v. Donaldson, supra.

The plaintiff has both an independent constitutional right to personal safety and treatment and a state-created right. In re Schmidt, supra. This liberty interest cannot be limited absent some substantial necessity. No such necessity has been shown. Financial concerns can be considered, but, they must be viewed in the light of the interest involved. No financial concerns have been offered in the record as it presently appears which

can justify 77 personal injuries in a four year period. The Third Circuit opinion should be upheld.

3) Right to Treatment.

This issue has been briefed extensively and very adequately by plaintiff as well as amici represented by the Mental Health Law Project. Present Amici will only note that the terminology used by defendants simply is an attempt to create an issue which is not present. The Pennsylvania statutes are very clear, as is the law, In re Schmidt, supra; i.e., an institutionalized person has a right to care and treatment. Those requirements alone can resolve this portion of the case. The district court could certainly review the denial of that state created due process right based upon traditional due process analysis.

f. Qualified Immunity.

"In order for an issue to be properly before the Court it must have been raised below." Procunier v. Navarette, 434 U.S. 555, 567 (1978), (Burger, C.J., dissenting). The defendants did not argue that they had a qualified right to immunity in the Court of Appeals. In Bivens v. Six Unknown Federal Narcotics Agents, this court determined that an issue not raised below could not be considered on appeal. As stated by Justice Brennen for the court, "this question was not passed upon by the Court of Appeals, and accordingly we do not consider it here." Id., 403 U.S. at 397, 398. Unlike in Procunier v. Navarette, supra, where the defendants claimed

a good faith defense, and where they could not reasonably have known that their actions were unlawful and, further, there was a record upon which to make this determination, in this case there was no such record nor were there any such claims of immunity by the defendants even though there was a full trial on the merits. For the court to consider the claims at this late date simply runs counter to the purpose of the Supreme Court. These issues should have been raised and briefed in a lower court based upon the factual presentations. Determination by the Supreme Court at this time is not appropriate.

CONCLUSION

The due process reasoning applied by the circuit court is simply a traditional analysis of fundamental liberty interests. It's findings may be in language which implies new constitutional standards; however, a rational examination clearly shows that the state, under traditional due process constraints, cannot confine someone for care and treatment and let that person be beaten, go untreated and be shackled, for days on end, to his bed. There was no showing of any compelling state interest, or any substantial need to confine the plaintiff in such an inhumane manner.

The Third Circuit's opinion should be upheld in its entirety.

Respectfully submitted,

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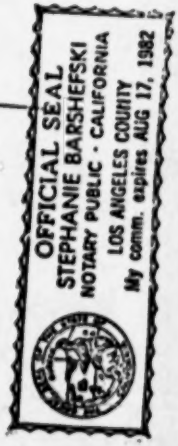

MOTION FILED
DEC 24 1981

No. 80-1429

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Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, et al.,
Petitioners,

v.

NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OUT OF TIME AND BRIEF OF *AMICI CURIAE* LOWELL P. WEICKER, JR., ROBERT T. STAFFORD AND HARRISON A. WILLIAMS, JR. IN SUPPORT OF RESPONDENT

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LAW REPRINTS EDITOR'S NOTE: THE MOTION OF LOWELL P. WEICKER, JR., ET AL. FOR LEAVE TO FILE A AMICI CURIAE BRIEF OUT OF TIME WAS DENIED BY THE COURT ON JANUARY 11, 1982, HOWEVER IN THE INTEREST OF PROVIDING A COMPLETE RECORD IT IS INCLUDED HEREIN.

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v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LOWELL P. WEICKER, JR., ROBERT T. STAFFORD and HARRISON A. WILLIAMS, JR. OUT OF TIME

Amici Lowell P. Weicker, Jr., Robert T. Stafford and Harrison A. Williams, Jr. move for leave to file the attached brief *amici curiae* out of time. In support of this Motion, the *amici* cite the following:

1. The parties to this litigation have consented to the filing of this brief *amici curiae* out of time. Their letters are being filed with the Clerk of this Court.

2. *Amici* are the Chairman and members of the Subcommittee on the Handicapped of the United States Senate Committee on Labor and Human Resources, which has original legislative jurisdiction over matters pertaining to mentally retarded and other disabled and handicapped individuals. As a result of hearings held over a number of years by the Subcommittee, Congress has found that mentally retarded persons can and do benefit from habilitation and therefore concluded that institutionalized retarded persons have a right to appropriate habilitation for their condition directed at maximizing their development. The individual members of the Subcommittee wish to provide this Court with the legislative findings and conclusions developed through extensive Congressional hearings and actions pertaining to the issues in this case.

3. *Amicus* Lowell P. Weicker, Jr., Chairman of the Subcommittee on the Handicapped, is an elected representative of the State of Connecticut. As such, he is concerned with the failure of the *amici curiae* brief filed by the Attorney General of the State of Connecticut to reflect accurately the views of the people of Connecticut. He is further concerned with the inaccurate factual premises contained in the Connecticut brief.

CONCLUSION

Because *amici* have a substantial interest in this case, and because their brief provides a perspective on the issues before this Court which has not been presented in the briefs filed in this case, this motion for leave to file out of time a brief as *amici curiae* should be granted.

Respectfully submitted,

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IN THE

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BRIEF OF *AMICI CURIAE*
LOWELL P. WEICKER, JR.
ROBERT T. STAFFORD and HARRISON A. WILLIAMS, JR.
IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The *amici* are the Chairman and members of the Subcommittee on the Handicapped of the United States Senate Committee on Labor and Human Resources. The Subcommittee has original jurisdiction over matters pertaining to the mentally retarded and other disabled and handicapped individuals.[1] As Chairman and members of the Subcommittee on the Handicapped and of the United States Senate, and as concerned citizens, the *amici* wish to provide this Court with the complete record of Congressional hearings, and the findings and actions based upon these hearings, relating to the rights of the mentally retarded. Based on this record, the *amici* support the positions of the respondent.

In addition, *amicus* Lowell P. Weicker, Jr., Chairman of the Subcommittee on the Handicapped, is a United States Senator from the State of Connecticut. As an elected representative of the people of the State of Connecticut, he is concerned with the failure of the *amici curiae* brief filed by the Attorney General of the State of Connecticut to reflect accurately the views of the people of Connecticut.[2] He is also concerned with the factual inaccuracies upon which the Connecticut brief is based.

Specifically, the *amici* are interested in providing this Court with the record of Congressional hearings, findings and actions which have caused the Congress to conclude that the mentally retarded

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1. The views expressed by the signatories to this *amici curiae* brief are the views of the individuals and do not represent an official position of the Subcommittee on the Handicapped, the Committee on Labor and Human Resources, or the United States Senate.

2. *Amici Curiae* Brief of the States of Connecticut *et al.* (hereinafter referred to as the "Connecticut brief").

"have a right to appropriate treatment, services, and habilitation ... designed to maximize the developmental potential of the person." 42 U.S.C. §6010 (1) and (2).[3]

SUMMARY OF ARGUMENT

It is the position of the *amici* that a mentally retarded person institutionalized in a public facility has a right to habilitation designed to maximize the person's developmental potential.

The Third Circuit in the case at bar correctly assessed the nature of mental retardation and the nature of institutionalization for mental retardation. The findings of the court below and its conclusion that mentally retarded persons confined to state

3. Congress has also concluded, after extensive hearings and investigations, that such treatment, services, and habilitation "should be provided in the setting that is least restrictive of the person's personal liberty". 42 U.S.C. §6010 (2). *Amici* will not address this issue in this brief in light of the Respondent's position that his claims are not premised on a right to least restrictive habilitation or treatment (Resp. Br. 10). However, it should be noted that the experts who presented testimony at hearings before the Subcommittee on the Handicapped agreed "that every effort should be made to insure that our [mentally retarded] citizens are provided every opportunity of being cared for in the least restrictive setting that is consistent with the person's ability for self care." *S. Rep.* 94-160, 94th Cong., 1st Sess. 33 (1975); see *Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973: Hearings on S.427 and S.458 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 1st Sess. (1973) (hereinafter referred to as "1973 Hearings"); *Developmentally Disabled Assistance and Bill of Rights Act, 1974: Hearings on S. 3378 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 2d Sess. (1974) (hereinafter referred to as "1974 Hearings"); *Developmentally Disabled Assistance and Bill of Rights Act, 1975: Hearings on S.462 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare,* 94th Cong., 1st Sess. (1975) (hereinafter referred to as "1975 Hearings"); *Care for the Retarded: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources,* 97th Cong., 1st Sess. (1981) (not yet published) (hereinafter referred to as "1981 Hearings").

The expert testimony before Congress contradicts the claim made in the Connecticut brief that "the profession...is now in a state of total disarray over...whether 'least restrictive' care...is necessarily the best or the most appropriate care available" for retarded persons. (Conn. Br. 3).

institutions have a right to treatment are consistent with the findings and conclusions of Congress developed over more than eighteen years. This record provides persuasive proof that even the most severely retarded persons have the potential to develop needed skills and assume greater responsibility for their own care. The record further shows that the institutionalization of retarded persons for care and treatment constitutes a deprivation of liberty. Failure to provide appropriate habilitation for the condition for which the retarded person has been institutionalized violates his basic rights.

Based on the record established by Congress over the past eighteen years, and for the reasons set forth in the brief of the Respondent and the *amicus* briefs of the American Orthopsychiatric Association *et al.*, and the American Psychiatric Association, the *amici* urge the Court to uphold the right of the institutionalized mentally retarded to adequate habilitation.

ARGUMENT

CONGRESS, BASED UPON EXTENSIVE FINDINGS, HAS RECOGNIZED THE RIGHT OF MENTALLY RETARDED PERSONS TO HABILITATION AS A BASIC LIBERTY TO BE PROTECTED BY GOVERNMENT.

As a result of more than eighteen years of exhaustive study, Congress has recognized that the mentally retarded persons of this nation have certain basic rights that are protected by their government. Congress has rejected the claims made by the petitioners and in the Connecticut brief in the case at bar that retarded persons are incapable of development and therefore need be provided with no more than custodial care. *See e.g., S. Rep.* 94-160, 94th Cong., 1st Sess. 28 (1975).[4] Instead, Congress has affirmed that the mentally retarded have the right to treatment to assist them to maximize their ability for self-care

4. Petitioners concede that retarded persons institutionalized in public facilities have a constitutional right to "food, clothing, shelter, reasonable safety and medical care." (Pet. Br. 11, 12n.10) The Connecticut brief recognizes that states have a duty to provide "food, shelter, supervision and care." (Conn. Br. 8).

and to live normal lives.[5]

Congressional attention was directed to the problems of the mentally retarded in February 1963 when President Kennedy delivered a Special Message to the Congress calling for the implementation of a national program to combat mental retardation. The President urged adoption of a program under which

> "emphasis on prevention, treatment, and rehabilitation will be substituted for a desultory interest in confining patients in an institution to wither away."

1963 *Public Papers of the President* 126, 128, 109 *Cong. Rec.* 1837, 1838 (1963).

Based upon the findings of his President's Panel on Mental Retardation, President Kennedy stated in his 1963 Message:

> We must move from the outmoded use of distant custodial institutions to the concept of community-centered agencies that will provide a coordinated range of timely diagnostic, health, educational, training, rehabilitation, employment, welfare, and legal protection services. For those retarded children or adults who cannot be maintained at home by their own families, a new pattern of institutional services is needed.

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5. As this Court noted in *Pennhurst State School & Hospital* v. *Halderman*, ___*U.S.*___, 101 S. Ct. 1531, 1534n.2, 67 L.Ed.2d 694 (1981), there is a technical difference between "treatment" for mental illness and "habilitation" for mental retardation. "Habilitation" refers to the education, training and care required by retarded individuals to reach their maximum development. *See Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 95n.14 (3d Cir. 1979); *S. Rep.* 94-160, 94th Cong., 1st Sess. 27-28 (1975).

One court has defined habilitation in terms of "programming designed to maximize an individual's human abilities and to enhance his ability to cope with his environment - [which] includes not only training to facilitate intellectual development, but also training in basic self-help skills, training in elementary communication and social skills, and avoidance of common environmental hazards." *Wyatt v. Ireland*, C.A. No. 3195-N (M.D. Ala. Oct. 25, 1979), at 6.

The terms "treatment" and "habilitation" will be used interchangeably in this brief, as they have by both Congress and the courts. *See Pennhurst State School & Hospital* v. *Halderman*, 101 S.Ct. at 1534n.2; *S. Rep.* 94-160, *supra*.

Id. at 134; 109 *Cong. Rec.* at 1841.[6]

Congress responded to this call by amending the Social Security Act to authorize funding for comprehensive mental retardation plans. *Maternal and Child Health and Mental Retardation Planning Amendments of 1963*, P.L. 88-156, 77 Stat. 273. The law was designed to

> "foster the development of the mental retardation aspects of programs of education, rehabilitation, welfare, employment, health, recreation, and protection of the legal rights of the mentally retarded."

S. Rep. 88-551, 88th Cong., 1st Sess., 1963 *U.S.CodeCong. & Ad.News* 1018, 1020.

Congress complemented this legislation by enacting a federal-state grant-in-aid program for the construction of research centers, facilities for the mentally retarded and community mental health centers in the *Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963*, P.L. 88-164, 77 Stat. 282.[7]

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6. The Task Force on Law of the President's Panel on Mental Retardation concluded that:

"The need of a mentally retarded person to have his personal rights protected does not end with his transfer to the custody of the superintendent of an institution at the conclusion of a hearing. No matter what the purpose of institutionalization, he has a right to receive training and care which will enable him to return to society or to lead a more useful and meaningful life within the institution."

Report of the Task Force on Law of The President's Panel on Mental Retardation 30 (1963).

7. The *Developmentally Disabled Assistance and Bill of Rights Act of 1975*, P.L. 94-103, as amended by P.L. 95-602 (1978), is the direct lineal successor of this Act. *See Compilation: Rehabilitation, Comprehensive Services and Developmental Disabilities Legislation, prepared for the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources* (Comm. Print 1979).

At the core of this legislation was the Congressional finding that the mentally retarded can learn with habilitation and therefore are entitled to fully develop their potential through treatment:

> To attack the problem of mental retardation the States require a comprehensive program of services including diagnosis, treatment, residential care, day care, education, training, and rehabilitation. Sheltered workshops can be of great assistance as part of a comprehensive center organized to restore the mentally retarded to the maximum degree of normal living in his community. In the absence of a coordinated program of services the mentally retarded person is denied the opportunity to develop most fully his potential for contributing to our society.

H. Rep. 88-694, 88th Cong., 1st Sess., 1963 U.S.CodeCong. &Ad.News 1054, 1061.[8]

The programs begun under the two 1963 Acts were continued and expanded in the *Mental Retardation Facilities and Community Mental Health Centers Construction Act Amendments of 1965*, P.L. 89-105, 79 Stat. 427, and the *Social Security Amendments of 1965*, P.L. 89-97, 79 Stat. 286, pursuant to which funds were authorized for the states to begin implementing the comprehensive mental retardation plans developed with previous funding.

Congress extended and further expanded these federal programs in 1967 to include grants to the states for the staffing and start-up expenses of community facilities. *Mental Retardation Amendments of 1967*, P.L. 90-170 §4, 81 Stat. 527.

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8. *See also Federal Aid for Construction and Operation of Community Health and Research Centers: Hearings Before the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); *Mental Health and Mental Retardation Programs: Hearings on H.R. 2567, 3688, 3689, 3939, 3940, 3947, 3948, 4622, 4623, 4663, 4664, 5023 and 5127 Before the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. (1963).

The programs were expanded in light of Congress' continued recognition that

> "mentally retarded children can be educated to be useful citizens, in many cases self-supporting, and in most instances to be free of the need for expensive institutional care. If adequately rehabilitated, between 75 percent and 85 percent of the mentally retarded can become self-supporting; between 10 percent and 20 percent can become partially self-supporting; only the remainder will continue to remain completely dependent."

S. Rep. 90-725, 90th Cong., 1st Sess., 1967 *U.S.CodeCong.& Ad.News* 2061, 2071 (views of Sen. Javits and Sen. Prouty).

In 1970, Congress passed the *Developmental Disabilities Services and Facilities Construction Amendments*, P.L. 91-517, 84 Stat. 1316. The emphasis of the new law was on planning and services rather than construction of facilities. It instituted a broad new federal-state grant-in-aid program to help the states develop and implement a comprehensive plan to meet the needs of the mentally retarded and developmentally disabled. *See* P.L. 91-517 §101(b), 84 Stat. 1316.[9] In this legislation, Congress broadened its concern from mental retardation alone to include other developmental disabilities such as cerebral palsy, epilepsy and other neurological conditions requiring similar treatment. Congress expressly embraced the developmental view that all mentally retarded, even the severely and profoundly retarded, have potential for learning and growth. *See S. Rep.* 94-160, 94th Cong., 1st Sess. 6-7 (1975). This approach, and the findings of Congress in this regard, were recognized by the Third Circuit in the case at bar. *Romeo* v. *Youngberg*, 644 F.2d 147, 165n.40 (3d Cir. 1980). The developmental view has also been judicially recognized in *Wyatt* v. *Stickney*, 344 F.Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part, rev'd in part, sub nom. Wyatt* v. *Alderholt*, 503 F.2d 1305 (5th Cir. 1974); *Halderman* v. *Pennhurst State School & Hospital, supra*, 612 F.2d at 95n.14;

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9. *See Mental Retardation and Other Developmental Disabilities, 1969: Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. (1969); *Developmental Disabilities Services and Facilities Construction Act of 1970: Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970).

Pennsylvania Association for Retarded Children v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257, 1259 (E.D.Pa. 1971) (three judge court); *Welsch* v. *Likins*, 373 F. Supp. 487, 495 (D.Minn 1974).

In 1971 Congress passed legislation requiring retardation facilities under the Medicaid program to provide habilitative services designed to enable the institutionalized mentally retarded to develop to their full potential. P.L. 92-223 §4, 85 Stat. 802 (1971); 42 U.S.C. §1396d (d). This legislation was designed to provide federal funding for the "active provision of rehabilitative, educational and training services to enhance the capacity of mentally retarded individuals to care for themselves or to engage in employment." 117 *Cong. Rec.* 44720 (1971) (remarks of Sen. Bellmon); *see also* 117 *Cong. Rec.* 44721 (1971) (remarks of Sen. Long).

Following extensive hearings, Congress in 1975 enacted the *Developmentally Disabled Assistance and Bill of Rights Act*, P.L. 94-103, 89 Stat. 486.[10] In addition to extending and revising the programs initiated under the earlier Act, the new law established a bill of rights for the mentally retarded and other developmentally disabled.[11]

Testimony given during the three years of hearings held by the Senate Subcommittee on the Handicapped on this legislation repeatedly established that mentally retarded and other developmentally disabled persons confined to public facilities were being denied their constitutional rights. Information

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10. *See* 1973 Hearings, *supra*; 1974 Hearings, *supra*; *Health Services Revenue Sharing, Part 2: Hearings on H.R. 11511, 11518, 11845 and 12892 Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. (1974); *H.R. Rep.* 93-1127, 93d Cong., 2d Sess. (1974); 1975 Hearings, *supra*; *Health Services Programs: Hearings on H.R. 2954 Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975); *S. Rep.* 94-160, 94th Cong., 1st Sess. 3-4 (1975).

11. Although this Court held in *Pennhurst State School & Hospital* v. *Halderman*, *supra*, that Congress did not create substantive rights in enacting this legislation, the findings of Congress were not disputed.

received by the Subcommittee indicated that

> "the institutionalized mentally retarded are the most neglected of all persons in our society. They have been subjected to ethical and legal abuses, with loss of rights, both civil and personal, frequently occurring without even a semblence of due process."

S. Rep. 94-160, 94th Cong., 1st Sess. 3 (1975); 1973 Hearings, *supra* at 323, 341.

The Subcommittee on the Handicapped heard extensive testimony concerning the conditions at various public facilities for the retarded, including the Willowbrook State School for the Mentally Retarded in New York and the Partlow State School and Hospital in Alabama. *S. Rep.* 94-160, 94th Cong., 1st Sess. 28-34 (1975).[12] Also considered was the judicial holding that

> "People involuntarily committed through non-criminal procedures to institutions for the mentally retarded have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society. That this position is in accord with the applicable legal principles is clear beyond cavil."

Wyatt V. Stickney, supra, 344 F. Supp. at 390; *see S. Rep.* 94-160, 94th Cong., 1st Sess. 30-32 (1975).

Based on the evidence before it, the Senate Committee on Labor and Public Welfare found that

> "...most large institutions for the developmentally disabled in the U.S. lack individualized treatment plans and programs. That is, care is primarily custodial; and little attention is paid to the resident's potential for increased self care, ability to utilize education or training."

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12. The conditions at Pennhurst State School and Hospital in the case at bar apparently are at least as "lamentable" as those in the institutions reviewed by Congress. *Romeo* v. *Youngberg, supra* at 181 (Seitz, C.J., dissenting).

Id. at 30. The Committee concluded that

> "Congress must take action to ensure the humane care, treatment, habilitation and protection of the mentally retarded. The Federal Government has the responsibility to provide equal protection under the law to all citizens."

Id. at 32.

Reflecting its "concern about persons who are institutionalized because they are developmentally disabled," *id.* at 3, the Committee approved a bill of rights containing "minimum standards to insure basic human dignity where institutional care for developmentally disabled persons is found." *Id.* at 33. The goal of these standards was "one of habilitation of the developmentally disabled individual who is in need of services." *Id.* at 34.

The standards approved by the Committee were predicated on the concept that all retarded persons can develop to their full potential with appropriate treatment. This view

> "...stresses that all developmentally disabled individuals have potential for learning and growth.
>
> From this developmental model, it follows that custodial care which is predicated on the assumption that certain individuals are essentially incapable of development must be rejected. The newer developmental model emphasizes concrete program goals for individuals and therefore encourages evaluation based on specific outcomes.
>
> A final, but critically important dimension of this new model is that developmentally disabled persons should live like nondevelopmentally disabled persons to the greatest degree possible.
>
> Every effort should be made to assist developmentally disabled persons to maximize their ability for self-care and to live normal lives."

Id. at 28.[13]

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13. The Connecticut brief, in effect, attacks this conclusion by stating that the mental retardation profession is in " a state of total disarray" over the

The view that the mentally retarded are "eternal children" incapable of development and requiring indefinite custodial care was totally rejected. *Id.*

The bill of rights for retarded persons was approved by the full Senate without objection. 121 *Cong. Rec.* 16522-23 (1975). It was evident during the full Senate's consideration of the legislation that the rights enunciated in the bill were deemed to be basic rights guaranteed to the mentally retarded. Senator Javits, the primary sponsor of the bill of rights provision, stated that

> "This bill of rights represents a reaffirmation of the basic human and civil rights of all citizens....
>
> Progress toward recognition of the basic human and civil rights of the mentally retarded and other developmentally disabled persons has been slow. The Federal Government has largely abrogated its responsibility in this regard and recently the greatest initiatives have come from our courts....

(fn 13 cont.)

question of whether all retarded persons can develop their self-help skills and reach their full potential through habilitation. (Conn. Br. 3-5, 22). As discussed *infra*, at n.21, and in the *amicus* brief of the American Orthopsychiatric Association *et al.*, this is simply not true.

Furthermore, "the most recent developments in the frequently cited *Wyatt* litigation" (Conn. Br. 3) provide further support that retarded persons benefit from habilitation, and do not, as claimed in the Connecticut brief, contradict this conclusion. The *Wyatt* court rejected the conclusions (cited in the Connecticut brief) of the experts employed by the State of Alabama in their attempt to modify the "Minimum Constitutional Standards for Adequate Treatment". *Wyatt* v. *Ireland*, C.A. No. 3195-N (M.D.Ala., Oct. 25, 1979), at 5-6, 9-10. The court specifically held that

> "[D]efendants seek to divide the residents into two groups: one to receive education and training; the other to receive enriching activities. They allege that the impetus behind this proposal is the fact that the nature of the resident population at Partlow has changed significantly since 1972. Eighty percent of the present population are severely or profoundly retarded; thirty-four percent have multiple physical handicaps.

> Congress should reaffirm its belief in equal rights for all citizens -- including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive federal support of facilities providing inhumane care and treatment of the mentally retarded. The bill of rights... represents this new direction, and begins this reaffirmation."

121 *Cong. Rec.* 16519 (1975).

Senator Stafford, at the time the ranking minority member of the Subcommittee on the Handicapped, stated on the floor of the Senate that the bill of rights

> "...was added to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization."

121 *Cong. Rec.* 16516 (1975).

Senator Schweicker, now Secretary of the Department of Health and Human Services, a cosponsor of the bill of rights provision, said during the Senate debate that

> "I strongly support four specific requirements in this bill of rights: Humane care, treatment, rehabilitation, and protection in residential facilities....Too often developmentally disabled persons are 'put away' in an institution and

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(fn 13 cont.)

> The Court acknowledges this change and is aware that adjustments must be made as the nature and needs of the population change. Training and educational services must be modified so they are suitable to the needs of the individual. The evidence does not persuade the Court, however, that the minimum constitutional standards should be modified to allow defendants to cease providing habilitation programming and to provide instead an 'enriched environment'. The constitutional right of each resident to a habilitation program which will maximize his human abilities and enhance his ability to cope with his environment would be threatened by this modification proposed by defendants. The Court will therefore deny defendants' motion to modify the 1972 order in this respect." *Id.* at 9-10.

> forgotten....Treating the developmentally disabled with more human dignity can bring additional benefits to themselves, their families, and to society."

121 *Cong. Rec.* 16522 (1975).

The Conference Committee on the bill replaced the lengthy Senate bill of rights with "a compromise which specifie[d] rights of the developmentally disabled." *H.R. Conf. Rep.* 94-473, 94th Cong., 1st Sess. 41, 1973 *U.S.CodeCong.&Ad.News* 943, 961.[14] The compromise "enumerate[d] Congressional findings respecting the rights of persons with developmental disabilities," including the finding that "the developmentally disabled have a right to appropriate treatment, services and habilitation." *Id.* at 41-42, 1973 *U.S.Code Cong.&Ad.News* 961. The right was

> "...included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts."

Id. at 42, 1973 *U.S.CodeCong.&Ad.News* 961.

Both Houses of Congress concluded that

> "(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person....

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14. The version of the legislation passed by the House of Representatives did not contain a bill of rights provision. *See H.R. Conf. Rep.* 94-473, 94th Cong., 1st Sess. 41, 1973 *U.S. Code Cong.&Ad.News* 943, 961.

> (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution or other residential program for persons with developmental disabilities that -
>
> (a) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons...."

P.L. 94-103 §111; 42 U.S.C. §6010.

The bill of rights was amended in 1978 to clarify that the enumerated rights were not exclusive. P.L. 95-602 §507, 92 Stat. 2955 (1978). *See H.R. Rep.* 95-1188, 95th Cong., 2d Sess., 1978 *U.S. Code Cong.&Ad.News* 7355, 7377.[15]

The ability of severely retarded and handicapped people to develop to their maximum potential with adequate habilitation and treatment led Congress to enact legislation in addition to the bill of rights to assure the provision of such assistance. Thus, building on the foundation established in the *Education of the Handicapped Amendments of 1974*, P.L. 93-380 §611 *et. seq.*, 88 Stat. 484, Congress in the *Education for All Handicapped Children Act of 1975*, P.L. 94-142, 89 Stat. 773, required that "the State[s] assure all handicapped children the right to a free appropriate public education...regardless of the severity of their handicap." 20 U.S.C. §1412(1) and (2) (c). Congress further required that a priority in implementing a free appropriate public education be given to those with "the most severe handicaps who are receiving an inadequate education." 20 U.S.C. §1412(3).

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15. The amendment added the following sentence:

> "The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons."

The 1978 legislation also changed the short title of the 1975 legislation to the "Developmental Disabilities Assistance and Bill of Rights Act." P.L 95-602, Title V (1978).

These requirements were imposed after extensive hearings held by the Senate Subcommittee on the Handicapped and in the House of Representatives.[16] Based on these hearings, it was concluded that

> "with proper education services, many [of the handicapped] would be able to become productive citizens, contributing to society instead of being forced to remain burdens."

S. Rep. 94-168, 94th Cong., 1st Sess. 9, 1975 *U.S.CodeCong.& Ad.News* 1425, 1433.

Similarly, with regard to severely retarded adults, Congress in the *Rehabilitation Act of 1973*, P.L. 93-112, 87 Stat. 355, completely revised the existing vocational rehabilitation program to provide

> "vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals, serving first those with the most severe handicaps, so that they may prepare for and engage in gainful employment."

29 U.S.C §701(1); *see also* 29 U.S.C. §721(a) (5) (A).[17]

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16. *See Education for the Handicapped, 1973: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973); *Education of the Handicapped Act Amendments: Hearings Before the Select Subcomm. on Education of the House Comm. On Education and Labor*, 93d Cong., 1st Sess. (1973); *Education for All Handicapped Children, 1973-74, Parts 1-4: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 2d Sess. (1974); *Education for All Handicapped Children, 1975: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. (1975).

17. *See S. Rep.* 93-318, 93d Cong., 1st Sess., 1973 *U.S.Code Cong.&Ad.News* 2076, 2092; *Rehabilitation Act of 1972, Parts 1 & 2: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. (1972); *Vocational Rehabilitation Services for the Handicapped: Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 92d

Congress, in this legislation, passed a civil rights act for disabled persons. P.L. 93-112 §504; 29 U.S.C. §794, Employing the exact language found in Title II of the *Civil Rights Act of 1964*, P.L. 88-352 §*601, 78 Stat. 252; 42 U.S.C.* §2000d, Congress provided that no mentally retarded or otherwise handicapped person

> "...shall...be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

29 U.S.C. §794.

The basic premise of the legislation, as indicated by Senator Humphrey in introducing the bill that was eventually enacted into law, was that mentally retarded and other handicapped people have a right to develop to their maximum potential:

> These people have the right to live, to work to the best of their ability - to know the dignity to which every human being is entitled. But too often we keep children, whom we regard as "different"...out of our schools and community activities altogether, rather than help them develop their abilities.... [They] are barred from our vocational training programs and from countless jobs they could perform well....
>
> These are people who can and must be helped to help themselves....[T]his is their constitutional right.

118 *Cong. Rec.* 525 (1972).

(fn. 17 cont.)

Cong., 2d Sess. (1972); *Rehabilitation Act, 1973: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973); *Vocational Rehabilitation Services, Parts 1 & 2: Oversight Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. (1973); *Rehabilitation Act Amendments of 1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974).

Recognizing that even the most severely handicapped person can learn when afforded the opportunity and that all handicapped persons have the right to develop to their full potential, Congress in the Rehabilitation Act rejected the view that mentally retarded and other handicapped individuals are "hopelessly incapable" persons to be consigned to "terminal care in an institution." *See* 118 *Cong. Rec.* 525 (1972) (remarks of Sen. Humphrey); 117 *Cong. Rec.* 42293-94 (1971) (remarks of Sen. Cook) *incorporated in* 118 *Cong. Rec.* 526 (1972) (remarks of Sen. Percy); 117 *Cong. Rec.* 45974-75 (1971) (remarks of Rep. Vanik); *S. Rep.* 93-1297, 93d Cong., 2d Sess., 1974 *U.S.CodeCong.&Ad.News* 6388-91.

In 1980, Congress responded to the "deplorable" conditions existing in public facilities for the mentally retarded and other institutions by passing the *Civil Rights of Institutionalized Persons Act*, 96-247, 94 Stat. 349 (1980). This legislation granted the United States Attorney General statutory authority to participate in civil actions brought to redress systematic deprivations of constitutional and Federal statutory rights of persons residing in state institutions.

Testimony presented to the Senate Committee on the Judiciary during hearings on this legislation revealed that there was "uniform agreement among those familiar with institutional environments that thousands of individuals [are] subjected to conditions and practices flagrantly violative of their most basic human rights." *S. Rep.* 96-416, 96th Cong., 1st Sess. 18, 1980 *U.S.CodeCong.&Ad.News* 787, 800.[18]

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18. Extensive hearings were held on this legislation. *S. Rep.* 96-416, *supra* at 9, 1980 *U.S.CodeCong.&Ad.News* 790; *see Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) (hereinafter referred to as "1977 Judiciary Hearings"); *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

Testifying on the experiences of the Justice Department in litigation to vindicate the rights of institutionalized mentally retarded people, Assistant Attorney General Drew S. Days, III concluded that:

> The experience of the Department in such litigation has demonstrated the existence of widespread practices in the operation of institutions in which persons are confined which deprive such persons of constitutional or statutory rights.

Id. at 18, 1980 *U.S.CodeCong.&Ad.News* 800.[19]

In enacting this legislation, Congress recognized that the institutionalized mentally retarded were not receiving the habilitation to which they had a right. *See* S. 1393 §4(1), 95th Cong., 1st Sess. (1977), *reprinted in* 1977 Judiciary Hearings, *supra* at 3; 1977 Judiciary Hearings, *supra* at 197; *S. Rep.* 96-416 , 96th Cong., 1st Sess. 7-8, 1980 *U.S.CodeCong.&Ad. News* 789.

In August of 1981, Congress reauthorized funding for the programs in the *Developmental Disabilities Assistance and Bill of Rights Act.*[20] In so doing, the Conference Committee strongly reemphasized the Congressional findings contained in the bill of rights that mentally retarded and other developmentally disabled persons have a right to habilitation:

> [T]he Conferees re-emphasize that they believe that developmentally disabled persons have a right to habilitative services in a setting which is least

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19. The Justice Department had been instructed by President Nixon to "take steps to strengthen the assurance of full legal rights for the retarded". 1971 *Public Papers of the President* 1111, 1112. During the Ford Administration, the Department was extensively involved in litigation to protect the rights of mentally retarded persons, and actively advocated in its efforts the establishment of a constitutional right to treatment for involuntarily institutionalized mentally retarded citizens. *See* Remarks of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, *reprinted in 121 Cong. Rec.* 19371-73 (1975) (remarks of Rep. Brademas). These efforts continued under President Carter. *See S. Rep.* 96-416, 96th Cong., 1st Sess. 39, 1980 *U.S.CodeCong.&Ad.News* 821.

20. P.L. 97-35 §911, 95 Stat. 357.

> restrictive of their personal liberty in accordance with section 111 of the Developmental Disabilities Assistance and Bill of Rights Act. [42 U.S.C. §6010]. The Congress will continue to examine this issue to ensure that developmentally disabled persons truly have a right to habilitative services in a setting least restrictive of their personal liberty....

H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 800 (1981)

Prior to this Congressional action, the Senate Subcommittee on the Handicapped held two days of hearings during which the Congressional findings and actions in enacting Section 6010 were thoroughly reviewed. *Care for the retarded Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. (1981). The witnesses at these hearing agreed that the right to habilitation was essential to ensure the development of retarded persons to their maximum potential.[21] The testimony

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21. The statements given by the mental retardation professionals of the State of Connecticut at these hearings directly refute the position taken by the Attorney General of the State of Connecticut in the Connecticut brief. (Conn. Br. 3-5. 18).

Gareth D. Thorne, Commissioner of the Connecticut Department of Mental Retardation, in his statement to the Subcommittee stated that the "mentally retarded represent a group of society's members who ... need special facilities and programs to insure the development of their maximum intellectual and adaptive potential." 1981 Hearings, *supra* . Roger McNamara, superintendent of Connecticut's "training school" for the mentally retarded, endorsed "the right to full treatment and habilitation". 1981 Hearings, *supra*. These statements belie the Connecticut brief's rejection of the developmental model. (Conn. Br. 3-5, 18).

The statements of the Connecticut mental retardation professionals accurately reflect the views of the people of Connecticut as established by public law. An institutionalized mentally retarded person in Connecticut has the right to "receive ... treatment which is adequate for his needs and for his development to his full potential ...." Conn. Gen. Stats. §19-575a(b). The rights of Connecticut's institutionalized mentally retarded were expanded by statute during the most recent session of the Connecticut General Assembly. P.A. 81-150 (1981).

overwhelmingly showed that even the most severely retarded individuals are able to develop given adequate habilitative services.[22]

Therefore, Congressional findings and conclusions over a period of more than eighteen years, culminating in the testimony presented at the hearings of the Senate Subcommittee on the Handicapped in the spring of 1981 and the subsequent Congressional reaffirmation of the right of mentally retarded persons to habilitation, support the judgment of the Third Circuit in the case at bar. Congress has specifically concluded that through habilitation a retarded person can acquire the basic self-care skills that will permit him to live in a community setting. Equally important, Congress has found that without such habilitation, the mentally retarded person's condition will deteriorate. Thus, although a retarded person might acquire sufficient skills to enable him to be released from an institution, inadequate habilitation will surely turn a temporary confinement into a life-long one.

Congressional findings establish that the right to treatment for the mentally retarded is a basic liberty and an equal protection right essential for retarded persons to maximize their

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(fn. 21 cont.)

In addition, Dr. Jennifer Howse, Deputy Secretary of the Office of Mental Retardation of the Pennsylvania Department of Public Welfare, indicated at the hearings of the Senate Subcommittee on the Handicapped that as the result of the *Pennsylvania Mental Health and Mental Retardation Act of 1966*, 50 Pa. Stat. Ann. §4401 *et seq.*, Pennsylvania has "developed a strong commitment to the provision of community services to mentally retarded people based on the normalization principle and the developmental model". 1981 Hearings, *supra*. She further stated that "Pennsylvania's program clearly demonstrates that all mentally retarded people can benefit from community programs". 1981 Hearings, *supra*. Thus, mental retardation officials of Pennsylvania have acknowledged that the state has a commitment to provide the mentally retarded with more than custodial care. (*See* Pet. Br. 17).

22. For example, G. Thomas Bellamy, Ph.D. from the University of Oregon related the story of how fifteen severely (IQ of 20-35) and profoundly (IQ of 0-19) retarded persons have learned to assemble small parts such as oscilloscope cam-switch actuators, circuit boards, chain saw components and transformer coils. 1981 Hearings, *supra*.

ability for self-care and to live normal lives. As the actions of Congress over the past eighteen years establish, it is a right which must be protected by the entire government.

For the reasons contained in the records of Congressional hearings, and the findings and conclusions based on these hearings, and for the reasons set forth in the Respondent's brief and the *amicus* briefs of the American Orthopsychiatric Association *et al.* and the American Psychiatric Association, this Court should uphold the right of the mentally retarded to adequate habilitation.

CONCLUSION

Amici join Respondent in respectfully urging this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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